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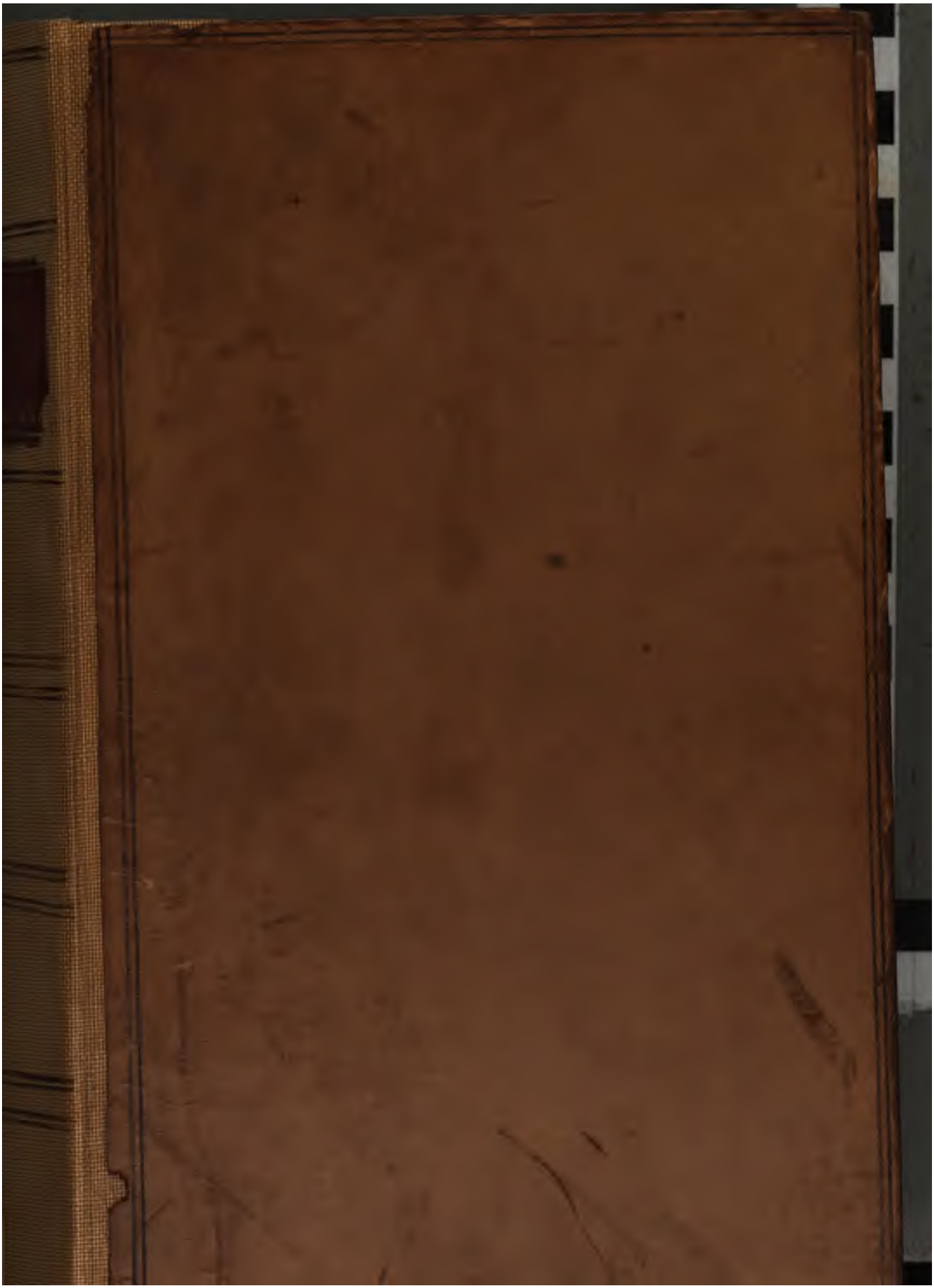

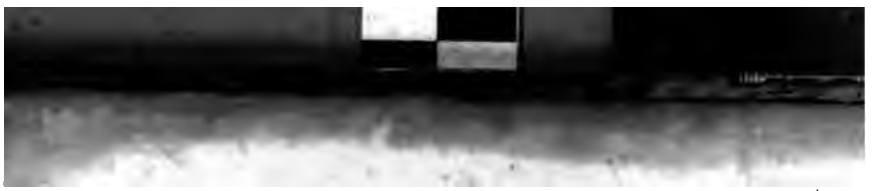

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CASES

DECIDED BY

THE HOUSE OF LORDS

ON

APPEALS AND WRITS OF ERROR,

2° & 3° VICTORIÆ,

SESSION OF PARLIAMENT 1839.

REPORTED BY

CHARLES HOPE MACLEAN, ESQ.

AND

GEORGE ROBINSON, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTERS AT LAW.

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M 10

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The Right Honourable

LORD COTTENHAM,

LORD HIGH CHANCELLOR OF GREAT BRITAIN.

ENGLAND.

LORD DENMAN, LORD CHIEF JUSTICE OF THE QUEEN'S BENCH.
LORD LANGDALE, MASTER OF THE ROLLS.
SIR LANCELOT SHADWELL, VICE CHANCELLOR OF ENGLAND.
SIR NICOLAS C. TINDAL, LORD CHIEF JUSTICE OF THE COMMON PLEAS.
LORD ABINGER, LORD CHIEF BARON OF EXCHEQUER.

SIR JOHN CAMPBELL, ATTORNEY GENERAL.
SIR ROBERT MOUNSEY ROLFE, SOLICITOR GENERAL.

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RIGHT HONOURABLE CHARLES HOPE, LORD JUSTICE GENERAL, AND LORD PRESIDENT OF THE COURT OF SESSION.

RIGHT HONOURABLE DAVID BOYLE, LORD JUSTICE CLERK.

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ANDREW RUTHERFURD, ESQ. succeeded by JAMES IVORY, ESQ. } SOLICITOR GENERAL.

IRELAND.

RIGHT HONOURABLE LORD PLUNKET, LORD CHANCELLOR.

RIGHT HONOURABLE JOHN PERRIN, LORD CHIEF JUSTICE OF THE QUEEN'S BENCH.

SIR MICHAEL O'LOGHLEN, MASTER OF THE ROLLS.

RIGHT HONOURABLE JOHN DOHERTY, LORD CHIEF JUSTICE OF THE COMMON PLEAS.

RIGHT HONOURABLE STEPHEN WOULFE, LORD CHIEF BARON OF THE EXCHEQUER.

MAZIERE BRADY, ESQ., ATTORNEY GENERAL.
DAVID R. PIGOT, ESQ., SOLICITOR GENERAL.

REPORTS OF CASES

UPON

APPEALS AND WRITS OF ERROR,

AND

QUESTIONS OF PEERAGE,

DECIDED BY THE HOUSE OF LORDS,

Session of Parliament 1839,

2 & 3 VICTORIA.

[19*th February* 1839.]

(Error from the Exchequer Chamber, England.)

The KING, Plaintiff in Error.—*Erle—Hurlstone.* (No. 1.)

THOMAS JOHNSON, Defendant in Error.—*Attorney General (Sir John Campbell)—Recorder of London (Law)—Bullock.*

Custom—City of London—Stat. 11 *Geo.* 1. *c.* 18. *sec.* 7.—*Jury.*—On quo warranto for exercising the office of alderman of London the defendant pleaded two customs of the city of London; viz. a custom for the court of mayor and aldermen to examine and determine whether a person elected alderman of a ward, and returned to the said court as such alderman, be, according to their sound discretion and consciences, a fit and proper person and duly qualified; and also a custom that where the

same person shall be three times elected to be alderman by a ward, and three times rejected by the court it may be and alderman as not a fit and proper person, and not duly qualified to support the dignity and discharge the duties of the office. The mayor and aldermen may be remedy thereof summons, elect and appoint a fit person, being a freeman, but if the whole body of citizens to be alderman of such ward. And further provided that a party who was three times returned by a ward has been approved made by the mayor and aldermen who elected the defendant: the matter was upon the customs of the customs and replied that the party rejected was in no qualified upon which issue was joined. The Lord Chief Justice at the trial directed the jury that if they were of opinion that the customs alleged had existed from time immemorial down to 1835, at which time there was a custom, they should find for the customs notwithstanding a 31 Geo. law of the 15 Anne. and the statute 5 Geo. 2. c. 18, which as alleged by defendant had put an end to the customs. The jury then found the customs and the Lord Chief Justice, without consent of parties, discharged the jury from returning a verdict on the issues as to matters, &c. as being immaterial. Upon motion for the defendant, and bill of exceptions by motion that affirming the judgment in error from the Exchequer Chamber which affirmed the direction of the Lord Chief Justice. That the statute 11 Geo. 1. c. 18, and the 31st year of the reign of Queen Anne, relating to the mode of election, stood well with the customs as proved, and did not touch the power of rejection and selection of the mayor and aldermen.

2. That where the jury have found their verdict on all the material issues joined, the judge who tries the cause may, without the consent of the parties discharge the jury from returning any verdict on issues that in his opinion are immaterial.

Practice. Per Lord Wynford.—In deciding on bills of exceptions, it is the practice of the Court not to go into the whole record, but to decide upon the points raised by the bill of exceptions.

IN February 1831 a vacancy having occurred in the office of alderman of the ward of Portsoken, Michael Scales and Daniel Whittle Harvey were respectively candidates for that office, on which occasion Scales was chosen by a majority of the inhabitants of the ward. A petition was then presented to the court of mayor and aldermen against the admission of Scales to the office of alderman, and that court having taken the petition into consideration, adjudged that he was not a fit and proper person to be alderman, and refused to swear him in. Two other elections subsequently took place, on each of which occasions Scales was chosen by a majority of the inhabitants, but the court of mayor and aldermen refused, as before, to swear him in, and after the last election appointed the defendant, Johnson, to the vacant office of alderman, alleging a custom that when the same person has been three times elected as alderman by the inhabitants of any ward, and three times rejected by the court of mayor and aldermen as unfit, that then the court of mayor and aldermen may elect as alderman any freeman out of the whole body of the citizens.

On quo warranto at the relation of Samuel Dalton against Thomas Johnson, for unlawfully exercising the office of alderman of the ward of Portsoken in the city of London,—

Plea 1.—That the city of London now is, and from time whereof the memory of man is not to the contrary hath been, an ancient city, and the citizens thereof a body corporate and politic: that there are divers wards, and amongst others the ward of Portsoken, and divers citizens and freemen have been called aldermen, one to each ward, which office of alderman is one of

The King v. Johnson. 19th Feb. 1839. Statement.

great trust and pre-eminence: that the court of mayor and aldermen is held within the said city for the purpose (amongst others) of admitting and swearing into the office of alderman persons duly elected thereto and qualified to fill the office: that wardmote courts are held within the city for the election by the inhabitants of the ward of persons into the office of alderman, by virtue of precepts issued by the mayor, to which precept returns are made into the court of mayor and aldermen: that there is an assembly called the court of common council, holden before the mayor and aldermen and the commons of the city, which has power to make bye-laws: that from time immemorial until the passing of a bye-law on the 1st August in the 21st of King Richard the Second, whereby it was ordained, that for the future in the elections of aldermen two honest and discreet men should be presented to the mayor and aldermen, so that either of them whom they should choose might be admitted and sworn: and also after the passing of a bye law made on the 15th of April in the 13th year of the reign of Queen Anne, intituled "An act for reviving the ancient manner of "electing aldermen," whereby, after reciting, amongst other things, that by the ancient usage and custom of the city of London, when any ward of the said city became vacant and destitute of an alderman, the inhabitants of that ward having a right to vote in such elections were wont to choose one person only, being a citizen and freeman of the same city, to be alderman of the same ward, for reviving the said ancient custom, and restoring to the said inhabitants their ancient rights and privileges of choosing one person only to be their alderman, it was enacted from thenceforth in all elec-

tions of aldermen of the said city, at a wardmote to be holden for that purpose, there should be elected, according to the said ancient custom, only one able and sufficient citizen and freeman of the said city, not being an alderman, to be returned to the court of mayor and aldermen, which person so elected should be by them admitted and sworn well and truly to execute the office of alderman, and from thence thitherto the aldermen had been elected at the wardmote courts, one for each ward.

The first plea then stated, that the court of mayor and aldermen have the cognizance, jurisdiction, and authority of examining, hearing, determining, and adjudging concerning the election and return of every person elected into any place or office at a wardmote court, (whensoever the merits of such election or return had been brought into question by the petition of any person interested therein,) and also of examining and determining whether or not any person so returned to the court of mayor and aldermen as an alderman of any ward, was according to the discretion and sound consciences of the mayor and aldermen a fit and proper person, and duly qualified, (whensoever the fitness and qualification of the person so returned has been brought into question by the petition of any person interested therein to the court of mayor and aldermen,) and that it was a necessary qualification of the person to be elected, admitted, and sworn alderman of any ward that such person should be a fit and proper person to support the dignity and discharge the duties of the office of alderman, and the honour and charge of the city, according to the discretion and sound consciences of the mayor and aldermen.

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Statement.

The first plea further stated, that within the city of London there now is, and from time immemorial there hath been and still is, a certain ancient and laudable custom there used and approved, viz., that whensoever the inhabitants of any ward should three times return to the court of mayor and aldermen the same person to be alderman of any such ward, who should be by the said court, according to the custom aforesaid, adjudged and determined, according to the discretion and sound consciences of the mayor and aldermen, not a person fit and proper to support the dignity and discharge the duties of the place and office of an alderman upon such three several returns, that then the court of mayor and aldermen lawfully might for remedy in that behalf nominate, elect, and admit a fit and proper person, being a freeman of the city, out of the whole body of the citizens, to be alderman of any such ward being so made destitute of an alderman.

The plea then stated the three successive elections and rejections of Scales, and the election of the defendant by the court of mayor and aldermen, in pursuance of the said ancient custom last above mentioned.

Plea 2.—The second plea was the same as the first, except that in the custom first set out it alleged the right of the court of mayor and aldermen to adjudicate generally on the fitness of the person elected, without the allegation of a petition to raise the question.

The third plea stated that in the election at which Scales and the defendant were candidates the latter was duly elected.

The replication denied the jurisdiction of the court of mayor and aldermen, traversed the custom to elect after three rejections as set forth in the first and second pleas

respectively, and, denying the allegation in the third plea, averred, in reference to the first and second pleas, that Scales at the times of the first, second, and third elections was an able and sufficient citizen, &c. and a fit and proper person to support the dignity, &c., to which there was a rejoinder, and issues thereon.

At the trial before Lord Denman, C. J., at the sittings in London after Michaelmas term 1834, the counsel for the King tendered evidence in support of the issues as to the fitness of Scales, at the several times when he was so rejected by the mayor and aldermen, to support the dignity and discharge the duties, &c., which being objected to, the Chief Justice refused the evidence offered, and wholly discharged the jury from giving any verdict upon the issues as to fitness, &c.; and the attention of the Chief Justice being directed to a certain act of parliament made and passed in the eleventh year of the reign of King George the First, intituled "An act "for regulating elections within the city of London, "and for preserving the peace, good order, and go- "vernment of the said city,"[1] the Chief Justice directed

[1] The act founded on is entitled "An act for regulating elections "within the city of London, and for preserving the peace, good "order, and government of the said city." There is a general recital in the preamble: "Whereas of late years great controversies and dissen- "sions have arisen in the city of London at the elections of citizens to "serve in Parliament, and of mayors, aldermen, sheriffs, and other officers "of the said city; and many evil-minded persons, having no right of "voting, have unlawfully intruded themselves into the assemblies of the "citizens, and presumed to give their votes at such elections, in manifest "violation of the rights and privileges of the citizens, and of the freedom "of their elections, and to the disturbance of the public peace: And "whereas great numbers of wealthy persons, not free of the said city, do "inhabit and carry on the trade of merchandize and other employments "within the said city, and refuse or decline to become freemen of the same, "by reason of an ancient custom within the said city restraining the "freemen of the same from disposing of their personal estates by their

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Statement.

the jury, that if they were of opinion that the customs set forth in the two first-mentioned pleas had existed from time immemorial down to the year 1689, then,

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" last wills and testaments: And whereas great dissentions have arisen " between the aldermen and commons of the common council of London " in or concerning the making or passing of acts, orders, or ordinances " in common council;" it then goes on to make various provisions, and recites the general evils which the act was intended to remedy; and the seventh section is in these words: " And whereas divers contro- " versies and disputes have arisen in the said city of London touching " the right of election of aldermen and common councilmen for the " respective wards of the said city; for quieting all such disputes and " controversies for the future, it is hereby further enacted by the autho- " rity aforesaid, that from and after the said first day of June in the " year of our Lord 1725, the right of election of aldermen and common " councilmen for the several and respective wards of the said city shall " belong and appertain to freemen of the said city of London, being " householders, paying scot as herein-after is mentioned and provided, " and bearing lot when required in their several and respective wards, " and to none other whatsoever." The 15th section is in these words: " And to the intent that a final end may be put to all disputes between " the mayor and aldermen and the commons of the common council " of the said city, touching the making or passing of acts, orders, or " ordinances in common council; and that no act, order, or ordinance " may for the future be made or passed in common council without " the full consent of the representative body of the said city, according " to the ancient constitution of the same; be it enacted by the autho- " rity aforesaid, that no act, order, or ordinance whatsoever, at any time " from and after the said first day of June 1725, shall be made or " passed in the common council of the said city, without the assent of " the mayor and aldermen present at such common council or the " major part of them, nor without the assent of the commons present " at such common council or the major part of them." In the 16th section the right of election of the lord mayor and aldermen to various offices is preserved to them, and taken out of the operation of the general words in the prior part of the act: " Provided always, that nothing " in this act contained shall extend or be construed to extend to any " election, nomination, or appointment in common council of any " common serjeant, town clerk, judges of the sheriffs court, coroner, " common crier, commissioners of sewers, garbeller, and the governor " and assistants of London of the new plantation of Ulster in Ireland; " but that the election, nomination, or appointment of all or any of " the said officers shall or may, from and after the said first day of " June 1725, be made by the mayor, aldermen, and commons in com- " mon council assembled, or the major part of them; any thing in this " act contained to the contrary thereof notwithstanding."

The King v. [illegible]

[illegible] Geo. III.

Judgment of Lawrence Justice.

secondly, that the Chief Justice directed the jury that if they thought the matters set forth in the two first-mentioned pleas had existed from time immemorial down to the year [illegible]. the act of [illegible] Geo. I. c. [illegible] did not put an end to such customs: and in that case he directed them to find a verdict for the defendant on the four issues first in order on the record.

It will be more desirable, in the first place, to state our opinion as to the second exception, as the judgment formed by us on that will form the groundwork of the opinion at which we have arrived upon the subject of the first.

The custom which forms the subject of the first and third issues is a custom that the mayor and aldermen, from time immemorial, have had the cognizance and determination of the assize and weight of every person exercising any trade or office in any particular case, whenever the merits of such custom were brought into question, and of examining and determining whether any person returned to them as an assizer of any ward of the city is according to the discretion and sound conscience of the mayor and aldermen a fit and proper person, and duly qualified in that behalf. The custom which forms the subject of the second and fourth issues is a custom that whenever it should happen that the inhabitants of any ward should three times return to the court of mayor and aldermen the same person to be an assizer of any such ward, who should upon such three several returns, according to the former custom, be admitted and determined, according to the discretion and sound conscience of the mayor and aldermen, not a person

" fit and proper to support the dignity and discharge " the duties of the place and office of an alderman of " the said city, that the court may for remedy in that " behalf, nominate, elect, and admit a fit and proper " person, being a freeman of the said city, out of the " body of the whole citizens, to be an alderman of such " ward so made destitute of an alderman. The first " custom set up is, therefore, a custom to approve or " reject; the second is a custom to nominate and elect, " in case the same person is three times returned by the " wardmote, and three times rejected as unfit by the " court of mayor and aldermen. Now the only excep- " tion taken to the direction of the Lord Chief Justice, " which goes to the validity of the customs above set " forth, is, that the jury should have been directed by " him that the statute 11 Geo. 1. c. 18. is in direct " contravention of those customs, and, in effect, has " abrogated them altogether. To the validity of the " first custom but little objection was made in the course " of the argument; indeed, after the determination of " the case of the King v. the Mayor and Aldermen " of London[1], where the legality of the custom of " approval or rejection was brought distinctly before " the Court of King's Bench, it is impossible to " contend that it was not a legal custom still existing " in full force, notwithstanding the statute of George " the First.

" The question, therefore, principally turns upon " the effect of the statute, as to the custom secondly " set forth. Now we think that custom, considered in " itself, a legal and reasonable custom, supplying a

[1] 3 Barne. and Adolph. 255.

The King v. Johnson. 19th Feb. 1835. Judgment in Exchequer Chamber.

remedy where an evil is likely to occur from the exercise of the custom to approve or reject, and without which remedy the first would become neither useful nor reasonable, from the consequences that might frequently follow from its exercise. The question therefore becomes this, whether this custom in the second case is repealed by the statute 11 Geo. 1.; and we are all of opinion that it is not in any way affected thereby. That statute was passed principally for the purpose of regulating the course of elections which take place at the wardmotes of the city, both of citizens to serve in parliament, of mayors and other officers, and as the first section expresses, "of aldermen and common councilmen, chosen at the respective wardmotes of the said city," and the first six sections of the statute are exclusively occupied with regulations as to the mode of taking the poll. The seventh section, after reciting that divers controversies and disputes had arisen in the city of London touching the right of election of aldermen and common councilmen for the respective wards of the city, enacts that, after the day therein specified, the right of election of aldermen and common councilmen for the several and respective wards of the city shall belong and appertain to freemen of the said city being householders, and paying scot and bearing lot when required, and to none other whatsoever. The seven following sections contain provisions as to particular cases of qualifications for voting at such elections, and the sections which alone are brought altogether to the subject matter of the present inquiry, so that the statute

" taken altogether is no more than an enactment that " the right of electing aldermen, amongst other officers, " shall be by the freemen of the city, being house- " holders, at the wardmotes of the respective wards, " the poll to be taken, and the right of voting to be " determined, in the manner and under the regulations " described in the act.

" Now the ancient customs, which are the subject " of the present discussion, have themselves been con- " firmed amongst the other ancient bye laws and cus- " toms of the city by parliament; and the first obser- " vation that arises thereupon is, that as these customs " were in full operation at the time of the statute, and " as the statute is altogether silent about the powers of " the court of lord mayor and aldermen, there is " nothing that can be construed into a repeal of either " of the customs. Again, it is to be observed that the " exercise of this custom is in no way inconsistent with " the statute, for the custom does not begin to operate " until after the statute and all the provisions con- " tained in it have had their full operation and effect. " The alderman must be first elected at the wardmote " by the electors qualified according to the provisions " of the statute, at a poll taken in the manner therein " prescribed, before he can be returned to the court " of lord mayor and aldermen for approval or rejection. " Then it is for the first time that the two ancient " customs begin to have their force. They contain a " mode of trial of the fitness of the return, made " under the statute, after the election has taken place, " and apply to a point of time which is altogether out " of the provisions of the statute. In fact, the effect of " the two customs, which are in effect acts of parlia-

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Judgment in Exchequer Chamber.

" ment, is this, that by the first the election at the " wardmote is annulled, and by the second, after three " rejections no further election at a wardmote is to " take place. Now this is not at all inconsistent with " a statute regulating elections only, in the case of their " taking place at a wardmote. The statute, therefore, " and the two ancient customs may both stand well " together, and we see no reason whatever for holding " that the customs are not in full force, notwithstanding " the provisions of the Act.

" It was further insisted in the course of the argu- " ment on the part of the relator that the bye law " of the 13th of Anne had the same effect as to the " annulling the customs set forth as the statute. It " appears to us, however, to be unnecessary to give " any other answer to this objection than that which " has already been given as to the statute of George " the First. Both stand precisely upon the same " ground, the only difference between the two objec- " tions being this—that whilst the statute is by neces- " sary implication only to be construed as speaking " of the election at wardmotes of the city, the bye " law is confined in express terms to that mode of " election.

" The other exception, tendered to the Lord Chief " Justice at the trial, related to his refusal to receive " evidence tendered to him upon the several issues " before referred to, and discharging the jury from " giving any verdict on the same. It appears to us " that the four issues which are first in order upon " the record having been found in favour of the de- " fendant, and the defendant being entitled, in our " opinion, notwithstanding the objections which have

" been taken, to judgment in his favour on those issues, " it has become perfectly immaterial in favour of which " of the two parties the jury might have found their " verdict on the issues in question; for the fitness or " unfitness of the party to fill the office of alderman " having been determined by a court not only of com- " petent but exclusive jurisdiction, any finding of a " jury on that point is altogether inoperative and " useless. If this record had contained a verdict in " favour of the relator upon these issues, we should " have allowed the defendant, notwithstanding such " verdict, to enter up judgment for himself; and it is, " therefore, unnecessary to say that we cannot agree " to send those issues to be tried at a very useless " expense before a second jury. Indeed the case of " Powell v. Sonnett and others in error, in the House " of Lords[1], furnishes a decisive authority that where " the jury have found their verdict on all the material " issues joined, the others being perfectly immaterial " as between the parties, they may be discharged by " the judge who tries the cause from returning any " verdict on issues that are immaterial, without the " consent of the parties.

" We therefore think the judgment of the Court of " King's Bench must be affirmed.

" My brother Bosanquet, who also heard this argu- " ment, requests me to say that he concurs in the " judgment we have given."

The Exchequer Chamber having affirmed the judgment of the Court of King's Bench, a writ of error was brought in parliament, which came on for hearing on

[1] 1 Bligh's Reports, 1827, p. 552.

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19th Feb. 1839.

Argument of Plaintiff in Error.

the 19th of February 1839 before the House of Lords, assisted by Chief Justice Tindal, Justices Littledale, Vaughan, Patteson, Williams, and Coleridge, and Barons Park, and Gurney.

Plaintiff in Error.—The principal points to be argued were:—1st. That the alleged custom for the court of mayor and aldermen to elect any person from the body of the citizens to be alderman in the event of their having three times rejected the person elected by the inhabitants of any ward is unreasonable, contrary to public policy, and void in law. The alleged custom of election is bad in law, for if such a custom prevailed, the court of mayor and aldermen might totally deprive the citizens of their right to elect their aldermen, and render their privileges in that respect subject to the arbitrary will and discretion of the court of mayor and aldermen, who would have only to reject as unfit the person three times elected by the citizens without giving any reason, and the election of every alderman would be in their hands. It is obvious how this alleged custom might be perverted to party and political purposes. It is not a reasonable custom that an irresponsible body should put aside the choice of the wardmote. Besides, if this custom existed of electing any person after the candidate chosen by the citizens has been thrice returned and rejected, there is no reason why the same custom should not exist when an individual has been twice or even once refused, and the consequence would be, as observed by Lord Tenterden in Rex v. The Lord Mayor of London[1], "That the court of mayor and "aldermen would have in their hands the absolute

[1] 9 B. & C. 1.

"control over all the elections to city offices by the "wardmote courts." A custom so liable to abuse is inconsistent with public policy.

2dly. That the said custom of election is in direct contravention of the 11 Geo. 1. c. 18., and of the bye law passed in the 13th year of the reign of Queen Anne set out in the pleadings. The question in controversy is, whether the defendant can maintain that he has a right to the office of alderman in respect of a twofold custom, by which the court of mayor and aldermen have not only a right thrice to reject the same person chosen by the wardmote, but that if they shall so reject on three several occasions the person thus often presented to them, this court of mayor and aldermen lawfully may elect a fit and proper person, being a freeman, out of the whole body of citizens, to be alderman of any such ward so made destitute. The alleged custom is inconsistent with the 11 Geo. 1. c. 18., which defines the electoral body who shall have the exclusive right, and consequently the act of parliament must prevail. The seventh section of that statute declares that the right of election shall appertain to freemen of the city being householders paying scot and bearing lot, and to none other whatsoever. The 14th section enacts, that no person shall vote at any election of alderman who shall have been discharged from paying to the rates and taxes to which citizens of London inhabiting therein are liable. Although the persons composing the court of aldermen must of necessity be freemen, yet they need not, and in fact some of them are not, householders paying scot and bearing lot. [Lord Brougham.—Do not these words apply to the franchise in the wardmote?] The 16th

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Argument of Plaintiff in Error.

section provides that the act shall not extend to certain officers, but that the election of those officers shall be made by the mayor, aldermen, and common council, thereby showing that the legislature made an express enactment where any right of election was intended to be continued to the mayor, aldermen, and common council, and excepted out of that act. The distinction betwixt electing and the right of setting aside the election is illustrated by the cases of Regina v. Mayor of Norwich[1], and Wright v. Fawcett.[2]

The alleged custom is also inconsistent with the bye law passed in the 13th year of the reign of Queen Anne, and if so, the bye law must prevail over the custom. The bye law shows upon the face of it the usurpation of the court of aldermen; it is entitled "An act for reviving the ancient manner of electing "aldermen," and the recital declares it to be made for the purpose of restoring the inhabitants their ancient rights and privileges of choosing one person only to be their alderman; and it enacts, that the person elected by the citizens should be by the court of mayor and aldermen admitted and sworn. The bye law and the act of parliament are uniform in their object, and the same right is established by both. Thus the bye-law was material in deciding as to the custom, of which last there was no evidence after 1689. Bye laws of the city of London not contravening any statute are of authority. Rex v. Mayor and Aldermen of London[3], Hutchins v. Player[4], and in the case of Wagoner[5], therein referred to.

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[1] 2 Lord Ray. 1244. [2] 4 Burr. 2041. [3] 9 B. & C. 1.
[4] Sir O. Bridgman's Judgments, p. 272. [5] 8 Co. Rep. 121 b.

3dly. That the Lord Chief Justice ought at the trial of this information to have allowed witnesses to be examined in support of the issues joined as to the fitness of Scales. The evidence rejected at the trial being in support of material issues should have been allowed to be adduced. If the replication upon which those issues are raised were bad in law, the defendant should have demurred. The power of judging of the fitness or not did not arise till after the election by the wardmote.

[*Lord Brougham.*—If the issue be clearly immaterial the case of Powell v. Sonnett and others[1] settled the point, that a judge is perfectly right in discharging the jury from finding a verdict upon such immaterial issue.]

The counsel for the defendant in error were not called on.

LORD BROUGHAM.—My Lords, I wish to ask your Lordships whether it is necessary that the counsel for the defendant in error should be heard. The learned judges have come to assist your Lordships in the two cases appointed for hearing to-day; but that does not, I apprehend, imply that it is necessary they should be heard throughout, and it will involve a waste of time if there is no reasonable doubt, and if the opinion of all the learned judges, as well as of your Lordships, is against the plaintiff in error, and in support of the judgment of the Lord Chief Justice, against whose decision the bill of exceptions was tendered, but which decision was affirmed in the court of error, the Court

[1] 1 Bligh's Rep. N. S. p. 552, and 3 Bing. 381.

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of Exchequer Chamber. I have reason to believe the learned judges still retain their opinion; if I am wrong they will interfere; but I believe it is the fact, that they have heard nothing to shake their opinion; if so, I think it will be an unwarrantable waste of time to prolong the argument. My noble and learned friend[1], formerly Chief Justice of the Court of Common Pleas, entirely assents to the view I have taken, that this judgment is perfectly right. I have attended most carefully to the argument of the learned counsel. I have never heard one syllable of the opposite side. I have not looked into the judgment of the court below. I have looked into the act of parliament, on which the main reliance is placed by the learned counsel, and I have not any doubt whatever in my mind; at the same time, if the learned judges were unanimously to tell me they have changed their opinion, I should have a doubt, and should desire to hear the other side. At present I humbly submit to your Lordships that the judgment of the court below be affirmed; and I do it in consequence of the view I take of this act of parliament, upon which the main reliance is placed. I am informed that the judges of the Queen's Bench have given no judgment. The Exchequer Chamber consisted of the judges of the two courts of Common Pleas and Exchequer. The learned judges of the Court of Queen's Bench are now, therefore, exercising their judgment; and if they have any doubt I will withdraw my motion, and consent to the argument proceeding.

(The learned Judges consulted together.)

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[1] Lord Wynford.

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My Lords, I find there is no doubt whatever existing among the learned judges of the Queen's Bench, so that it is so much fairer towards the party who is the plaintiff in error, for it is on his own showing that he has not been able even to raise a doubt. This entirely concurs with the view I have taken upon the subject. I have heard with the greatest attention every argument which has been brought forward by the learned counsel, not only whatever suggested itself to his own acute and experienced mind, but whatever the eagerness and the anxiety of the client, outstripping the professional zeal of the advocate, could suggest: we have heard him present his argument with all those additional reinforcements which a person so materially interested in the result might be reasonably expected to present; but the whole has left my mind entirely free from doubt.

My Lords, I consider that this act of parliament was intended to prevent the mischief which is stated in the preamble as the governing motive of the legislature. No doubt that mischief applied very much to persons unqualified intruding themselves in the choice of mayor, and in the choice of aldermen; for it says "that the "right of election in the respective wards shall belong "and appertain to freemen of the said city of London, "being householders paying scot and bearing lot in "their several and respective wards, and to none other "whatsoever." That is a clear and distinct enactment, relating entirely to who shall and who shall not exercise that franchise at the wardmote; it has no reference to what ought to be done in respect of admission in case of rejection. There is no reference to any custom, there is no reference even to any bye law; but in my

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opinion the act of parliament and the custom may very well stand together, because it is quite consistent with the custom that the wardmote shall be constituted in a particular way. The election is by the wardmote, but the approval may be in the mayor and aldermen; and really on that point I entertain no doubt. I need not inquire into the effect of the bye law which appears upon the record, but not on the bill of exceptions. But giving the party the benefit of it, it appears to me that the argument raised upon it comes to nothing, and that it is subject to the same observation as the other.

With respect to the point as to discharging the jury, I think it is quite clear that a judge has authority, even without the consent of the parties, to discharge the jury from giving a verdict where the finding cannot be material. In this case it is clear it could not be material. It might be material in the case put of a libel, to which the defendant pleaded the general issue and a plea of justification. It is said, when the jury have found not guilty, what signifies it whether it is true or false? It does not signify as to the question in this case, but it may signify as to the costs of that issue; because the plea of not guilty being affirmed by the finding of the jury, would discharge the defendant, and saddle the plaintiff with the general costs; but then there would remain the other question, who shall pay the costs of the special plea of justification? If that special plea were found one way one party would pay those costs, and if it were found the other way the other party would pay the costs. How then can it be said to be quite immaterial whether the publication is true or not? It is clear, therefore, that case does not apply to this,

because whichever way this was found there would be no costs.

Upon these short grounds which I have run over, (and I am not aware that it is necessary I should detain your Lordships upon any other,) I have no hesitation whatever in asking your Lordships to determine this case without further discussion; it would be throwing away more of the valuable time of the learned judges, and of your Lordship's time, in this case, and I think it would be setting a wrong precedent, for the consequence would be, that if the learned judges had been summoned, even if the case turned out to be a clear one, which I think this is, you would be obliged to waste your time and theirs in going through the case: I will not be a party to laying down any such precedent. On these grounds I humbly move your Lordships that the judgment be affirmed.

LORD WYNFORD.—My Lords, a decision of mine having been referred to by the learned counsel at the bar, I beg to say that it appears to me I gave a right judgment, though perhaps with a wrong reason, as I find it reported. My Lords, I am happy to be informed that it is not my judgment, but the judgment of a learned judge much more likely to give a right reason than I am. I think a better reason might have been given for it.

With respect to the motion made by my noble and learned friend, I entirely concur in it. The case is so extremely plain that it appears to me impossible that any two lawyers can doubt about it. With respect to the point of the consent of parties being required where a judge feels it to be his duty to disencumber the cause

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of a parcel of lumber perfectly immaterial to the real issue, it would be absurd if he was not at liberty to do that without the consent of the parties; and in this case I conceive if the issues in question were immaterial he was perfectly justified in discharging the jury from finding a verdict upon those issues, though the parties might refuse to consent. At the same time I agree with my noble and learned friend that if the finding upon those issues made any difference either in the costs or in any other respect, he must have the consent of the parties. The issues in question became immaterial when the existence of the custom was established, and as their being found one way or the other could make no difference to the parties, it appears to me the learned judge did perfectly right in getting rid of them.

It seems impossible to doubt that the act of parliament applies to the first election, and may very well stand with this bye law. As my noble and learned friend very properly observed, we cannot take any notice of the record, for there is no exception to it. It is the practice of the Court not to go into the whole record, but to decide upon the points raised by the bill of exceptions; but that is not very material, because the statute clearly applies only to the first election, and not to what might be done after the first election is over. The legislature saw that it was likely that great mischief might arise if some mode was not found to prevent any improper persons from interfering at the wardmote. The words of the statute applied distinctly to the wardmote, and the statute being intended to regulate the first election, it said that none shall interfere but persons duly

qualified, according to the terms of that act; and the wardmote having elected a person whom the court of lord mayor and aldermen do not think a proper person to be elected, the lord mayor and aldermen interfere upon that. Under this bye law the matter is entirely in the hands of the lord mayor and aldermen.

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It appears to me that that point is perfectly clear, and that what they have done with respect to the rejection of one candidate, and the election of another candidate,—these elections having taken place of a person whom the lord mayor and aldermen did not consider a proper person to fill the office,—is perfectly justified in law. For these reasons I entirely concur in the motion made by my noble and learned friend.

Lord Chancellor.—My Lords, I entirely concur in the course proposed to your Lordships. It can never be said that because your Lordships have thought fit to call in the assistance of the learned judges the course of proceeding should be different if your Lordships on hearing one side feel no doubt, and there is no question to be referred to the learned judges. It does so happen that we have the opportunity of ascertaining on the present occasion, that all the learned judges, and all your Lordships here present, are of one opinion upon the subject of the present case, and therefore it would be extremely imprudent to occupy further time upon the consideration of the subject, when the statement of the plaintiff in error has not created any doubt in the minds of any of your Lordships.

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My Lords, with reference to the construction of the act, it appears to me abundantly clear, that the seventh section was not addressed to any thing like the present case; it was to regulate the right of original election, leaving to be decided by the existing custom what was to be done with the party so elected. The question is, what power there is in the court of aldermen to deal with an election by the wardmote; and the seventh section, being confined as it is to the original election, does not touch any right which may exist elsewhere of controlling the admission of the person to be invested with the office of alderman.

With regard to the rejection of the evidence of fitness, in the present stage of the case, in the view that your Lordships take of it at all events,—that is utterly immaterial, this custom being found to exist, and your Lordships being of opinion that it is a legal custom, and that the court of aldermen have the power contended for, the eligibility of the party being a matter entirely in their discretion, and subject to their judgment: the opinion of the jury with respect to his fitness could never be material: for these reasons I entirely concur in the opinions expressed by my noble and learned friends, that the judgment of your Lordships should be for the defendant in error.

Mr. Attorney General.—My Lords, I move for costs.

The House of Lords ordered and adjudged That the judgment given in the said Court of Exchequer Chamber for the said defendant, affirming a judgment of the said Court of King's Bench, be and the same is hereby affirmed:

and that the record be remitted, to the end execution may be had thereupon as if no such writ of error had been brought into this House: And it is further ordered, That the said plaintiff in error do pay or cause to be paid to the said defendant the costs incurred in respect of the said writ of error, the amount thereof to be certified by the clerk assistant.

OWEN and DIXON — R. F. NEWMAN, Solicitors.

[*25th February* 1839.]

(Appeal from Court of Session, Scotland.)

(No. 2.) JAMES FARQUHAR GORDON and others, the Trustees and Executors of DAVID CLYNE[1], Appellants.—*Tinney—James Russell.*

GEORGE DUNNET, JAMES TRAILL, and DAVID HENDERSON, Respondents.—*Burge—John Stuart.*

Arrestment—Assignation—Right in Security—Proof.—A party held an intimated assignation, as a security for certain specified debts and relief of specific obligations; another party, creditor of the granter of the assignation, used arrestments in the hands of the assignee, and of the debtor in the assigned debt. Held (affirming the judgment of the Court of Session) that the assignee, in accounting with the arrester, was entitled to take credit, in the first place, for the amount of the debts and obligations specified in the assignation, and all expenses relating thereto; secondly, for all sums paid to or for behoof of and for all furnishings made by him to the common debtor prior to the arrestment; and, thirdly, for all sums which, though paid for behoof of the common debtor after the date of the arrestment, were paid in virtue of obligations contracted prior thereto: Held further (affirming as aforesaid) that it was competent for the assignee to prove by the oath of the common debtor that his claims fell under one or other of the above descriptions.

Costs.—Per L. C. Incompetent to appeal for costs, and it is indispensably necessary to maintain the rule, that parties appealing should not be permitted to mix up their appeal with matter of merits in order to cover an appeal for costs.

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[1] Reported in 11 S., D., & B., 791.

Practice.—Question, whether when appealing against a judgment of the Court, it is competent to include in the appeal interlocutors of the Lord Ordinary in the cause, not previously made the subject of a reclaiming note.

1st Division.

Lord Ordinary Fullerton.

THE late Mr. David Clyne raised an action against a person named Fraser for payment of money alleged to be due, and on the dependence thereof he used arrestments in the hands of the respondent Dunnet, and of the respondents Traill and Henderson respectively. The respondent Traill was trustee of a Colonel Williamson, from whose estate Fraser was entitled to receive dividends; the respondent Henderson was factor for the trust. Prior to the arrestment Fraser had assigned his claims upon Colonel Williamson's estate to the house of M'Beath and Dunnet, of whom the other respondent was the surviving partner, in security of certain advances and furnishings made to him. The assignation was granted 23d April 1823; a dividend of 10*s.* in the pound was paid 22d July 1824. Clyne's arrestments were in May 1825, and he obtained decree in his action against Fraser in June thereafter. A further dividend of 5*s.* in the pound was paid in January 1830. In April 1830 Clyne brought an action of furthcoming against the respondents, in which he claimed the balance due to Fraser by Williamson's trustees, after paying the advances and furnishings specified in the assignation. The respondent Dunnet contended that he was not bound to make forthcoming funds not in his hands at the date of the arrestment; and further, that he was entitled to apply funds received by him under the assignation to advances made on the faith thereof, though these advances were not referred to in the assignation. The other respondents contended,

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that as Fraser was entirely divested by the assignation the action was improperly directed against them.

On the 1st December 1832 the Lord Ordinary pronounced the following interlocutor:—"Appoints the "defender Dunnet to put in a statement of the account "between him and Fraser, showing the balance that "was due, first, at the period of the first dividend; "secondly, at the date of the arrestment; and, thirdly, "at the date of the second dividend, &c." That dividend was received at a period subsequent to the arrestment.

A state was accordingly lodged by Dunnet, and after objections and answers with which avizandum was made, the Lord Ordinary pronounced an interlocutor on the 9th March 1833, in the following terms:— "Finds, that in the accounting between George Dunnet "as arrestee, and David Clyne, the former is entitled "to take credit, in the first place, for the amount of the "debts and obligations in security and relief of which "the assignation to him by Fraser the common debtor "was granted, and all the expenses relating to these "debts and obligations; secondly, for all sums paid to "or for behoof of, and for all furnishings made, to the "common debtor, prior to Mr. Clyne's arrestment in "1825; and, thirdly, for all sums which, though paid "for behoof of Fraser the common debtor, after the "date of the said arrestment, were paid in virtue of "obligations contracted prior to said date; but finds "that Mr. Dunnet the arrestee is not entitled to credit "for any advances or furnishings made to the common "debtor subsequent to the date of the said arrestment, "and not falling within the preceding finding: Finds, "that Mr. Clyne is, in virtue of his arrestment in the

"hands of Mr. Dunnet, entitled to any balance which, "on the application of the principles above laid down, "may be found to remain in the hands of the said "arrestee, but only on the condition of relieving "Mr. Dunnet of the bond of caution granted by him "in the loosing of arrestment on the dependence of the "action of William Sutherland against Fraser, the "common debtor, being one of the obligations still "outstanding in relief of which the assignation was "granted: Finds farther, that Mr. Clyne is, on the "performance of the above-mentioned condition to "Mr. Dunnet, entitled, in virtue of his arrestment in "the hands of the other defenders, Colonel William-"son's trustees, entitled to draw any balance which "may remain due by the said trustees to Fraser the "common debtor, in so far as necessary for payment "of the debt due by the common debtor to the arrester: "Lastly, in respect that Messrs. Clyne and Dunnet "differ in regard to the amount of the advances or "furnishings actually made to or for behoof of the "common debtor, remits the case to Mr. Donald "Lindsay, accountant, to examine the accounts, and "to report upon the balance which may be due by "Mr. Dunnet agreeably to the preceding findings."

Two of the parties, viz. the pursuer Mr. Clyne, and the respondents, Colonel Williamson's trustees, presented reclaiming notes against this judgment to the First Division of the Court; Mr. Clyne praying for certain alterations on the judgment, which would increase the balance subject to his arrestment, and Colonel Williamson's trustees praying to be assoilzied from the action, and to be found entitled to expenses.

These reclaiming notes were advised on the 27th of

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Judgment of Court, 27th June 1833.

June 1833, when the following interlocutor was pronounced:—" The Lords having advised this cause with " the mutual reclaiming notes, and heard counsel, " adhere to the interlocutor of the Lord Ordinary " reclaimed against, refuse the desire of both the " reclaiming notes, and reserve all questions of expenses " till the final issue of the cause."

In November 1833 Mr. Clyne died, and the appellants, as trustees under his settlements, sisted themselves as parties in the action, and got the remit to the accountant renewed, who thereupon made a report, showing a balance due by Mr. Dunnet after applying the dividends received on the principles of the preceding interlocutor. There being a defect of proof of some of the items allowed, Dunnet proposed to refer to the oath of Fraser, which having been allowed by the Lord Ordinary, the appellant reclaimed. The Court, after an amendment of the minute of reference, also sustained the reference.

Judgment of Court, 29th June 1836.

On the 31st of January 1837 the Lord Ordinary pronounced the following interlocutor with reference to the question between the appellants and the respondent Dunnet:—" Finds it proved by the oath " of Fraser the common debtor, that the advances " of cash and furnishings set forth in the account- " ant's report do fall under one or other of the de- " scriptions in the interlocutor of the 9th of March " 1833, with the exceptions, first, of the sum of " 10*s.*, being the additional articles of the account of " furnishings ending in 1823; secondly, of the sum of " 2*l.* 7*s.*, consisting of cash advances, said to have been " made by Mr. Dunnet to Mr. Fraser; and, thirdly, " the sum of 10*l.* 15*s.* 3*d.*, being the business account

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" points of the case, and that a very great, and, as it " appears to the Lord Ordinary, unnecessary expense " has been created by the very critical mode of " accounting, insisted in with so much pertinacity by " the pursuer, the Lord Ordinary thinks that in " justice to the defender he must be allowed his " expenses."

On the 1st February 1837 the Lord Ordinary pronounced the following interlocutor with reference to the question between the appellants and the respondents, Colonel Williamson's trustees: — " Finds the " pursuers entitled, under their arrestments, to any " future dividend that may be declared and become " payable to the common debtor by the said defenders " in their character of trustees, with any interest that " may become due thereupon, and that to the extent " only, and in extinction pro tanto, of the debt " due to the said pursuers; they, always before " extract, relieving the other arrestee of his cau- " tionary obligation, in terms of the separate inter- " locutor of yesterday's date: Finds no expenses " due to either party, and decerns to the above effect " accordingly.

" *Note.*—In this case both parties have carried their " pleas too far; the pursuer in maintaining that the " assignation in favour of Dunnet was of no effect " whatever in divesting the defenders, the arrestees; " and the defenders in contending that the assignation, " though confessedly only an assignation in security, " totally and absolutely divested them, without any " regard to the question whether the debt secured " by it had been paid or not, a point which has already " been decided against the arrestees by the interlocutor

"of 9th March 1833. In these circumstances, the "Lord Ordinary thinks that neither party is entitled "to expenses."

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The appellants reclaimed against these interlocutors, praying the Court to alter the interlocutor of the 31st of January in the question with Mr. Dunnet, in so far as it found Mr. Dunnet entitled to expenses, and to find him liable in the expenses of process; and also to alter the interlocutor of the 1st of February in the question with Colonel Williamson's trustees, in so far as it found no expenses due to either party, and to find Colonel Williamson's trustees liable in expenses.

Colonel Williamson's trustees also reclaimed against the interlocutor of the 1st of February, praying the Court to alter it, in so far as regarded expenses, and to find that they were entitled to their expenses.

Judgment of Court, 30th June 1837.

On the 30th June 1837 the Court, on advising these reclaiming notes, pronounced the following interlocutor:—"Adhere to the interlocutor reclaimed "against, in so far as it finds George Dunnet entitled "to his expenses, and refuse the desire of this re- "claiming note on that point; of new, find ex- "penses due to the said George Dunnet, and remit "the account thereof, when lodged, to the auditor "of Court, to tax and report; adhere also to the "said interlocutor, in so far as regards the question "with Colonel Williamson's trustees, and refuse the "desire of both reclaiming notes on that part of "the cause."

Against this judgment the appellants brouhgt their appeal, and also against all the interlocutors pronounced in the cause, being eleven in number.

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Appellants Argument.

Appellants.—An arrester is entitled to have the funds arrested made forthcoming to him by the arrestee, unless the arrestee shall establish a lien over them, or produce evidence that they are attached by diligence preferable to the arrester's diligence.

The oath of Fraser was inadmissible to prove the items of account not otherwise established. In the first place there was evident collusion between Dunnet and Fraser, and in the second place the account was not liquid before the arrestments were used. In the ordinary case the arrestee, in a process of forthcoming, may refer his defence to the oath of the common debtor; but where there is collusion, or when a debt, of which compensation or retention is pleaded, was not liquid before the arrestment was used, the oath of the common debtor cannot affect the claim of the arrester.

The firm of M'Beath and Dunnet, who were the original assignees of the common debtor Fraser, and Mr. Dunnet as the surviving partner of that company, were not entitled to apply or hold the funds assigned in security for any other purposes than the purposes specified in the assignation; neither can it be contended that the respondent Mr. Dunnet, as an individual, had any right to apply or hold the funds assigned to M'Beath and Dunnet in security, nor any title to a preference over these funds, in competition with Mr. Clyne's arrestment.

As the appellants have succeeded, in a process of forthcoming, in proving the existence of a fund which was denied by the arrestees, they ought to have been found entitled to expenses; and they ought not at any rate to have been found liable in expenses to the respondent Mr. Dunnet, who, as an arrestee, maintained,

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contrary to the fact, that he held no funds which he was bound to make forthcoming. The appellants only asked for that which they could not have obtained without a suit; that part of the interlocutor which gave costs cannot be maintained.[1] The recent case of Smellie v. Miller before the Appeal Committee is a clear decision in support of this appeal.

Respondents Argument.

Respondent Dunnet.—As this respondent could not be bound to make forthcoming any funds of the arrestee which have never come into his possession, and for which he never was liable to the common debtor, he is not chargeable in this accounting with any other sums than the two dividends which he, as assignee of the common debtor, received from Colonel Williamson's trustees, and in accounting for the sums actually received by him on account of the common debtor, he is entitled to credit for the debts and obligations in security and relief of which the assignation by the common debtor was expressly granted, and for all expenses incurred by the respondent in reference to these debts and obligations. Besides this, he is further entitled to credit for all advances and furnishings by him to or for behoof of the common debtor prior to Mr. Clyne's arrestment in 1825, and for all sums which, though paid for behoof of Fraser the common debtor after the date of the said arrestment, were paid in virtue of obligations contracted prior to that date. And the respondent was entitled to prove, as he in fact did,

[1] Ersk. b. iii. tit. 6. sec. 2. 11. 15.; 2 Bell's Comm. 66; 2 Bell's Comm. 637, 638; Wardrop, Feb. 1744; Dict. 1025; Stair, b. iii. tit. 1. sec. 42., b. iv. tit. 35. sec. 6.; Creditors of Menie v. Bloomfield, Dec. 7, 1736, Elch. voce Arrestment.

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such payments and furnishings by the oath of Fraser the common debtor.

The real question in the cause is as to the costs.

The interlocutor of 1837 adopts the report of the Lord Ordinary, and the principles laid down by him; and it is not competent to reverse that part of the interlocutor of 1837 against which no reclaiming note has been presented without infringing the express provisions of the statute 48 Geo. 3. cap. 151. sect. 15.[1]

Respondents Traill and Henderson. — As the appellants did not think proper to take the judgment of the Inner House upon the propriety of paying the second dividend from Colonel Williamson's estate to the other respondent Mr. Dunnet, it is not competent to bring that part of the case under appeal. By the 48th Geo. 3. cap. 151. sect. 15., which is an act concerning the administration of justice in Scotland, and concerning appeals to the House of Lords, it is enacted, "that hereafter no appeal to the House "of Lords shall be allowed from interlocutory judg- "ments, but such appeals shall be allowed only from "judgments or decrees on the whole merits of the "cause, except with the leave of the Division of the "judges pronouncing such interlocutory judgments, "or except in cases where there is a difference of "opinion among the judges of the said Division; nor

[1] Ersk. b. iii. tit. 6. sec. 16.; Forbes, 20 Feb. 1711, Horn, Dict. 12464.; Kames, 62; Nairn, 1725, Dict. 12468; Maitland, Gibson, and others v. Wills, 2 Dec. 1826, 5 S. & D. 74.; Ersk. b. iv. tit. 2. sec. 8.; Blair v. Balfour, 9 July 1745; Dict. 12473; Hogg v. Low, 13th June 1826, 4 S. & D. 702.

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object of my referring to it at all is, that there may be no misconception as to the case that has been referred to. My Lords, the case of Smellie v. Miller was a petition which was disposed of by the Committee of Appeal, not by your Lordships House, and therefore can go no further than the individual opinions of such of your Lordships as happened to be present upon the Committee of Appeal; but what was done upon that petition your Lordships will see in a moment does not proceed upon the ground for which it has been cited at your Lordships bar. There were two interlocutors appealed from. The objection to the appeal as to one was, that it was an interlocutor of the Lord Ordinary; the objection raised to the other was as to matter which had been gone into by a Division of the Court of Session by a reclaiming note. I have no recollection of the case, or of the grounds on which it was disposed of; but it is clear that as there were two points raised, it could not have been decided in favour of the petitioner, and the appeal dismissed, unless the committee had been in favour of the case stated by the petitioner on both points. This question of form will have to be considered if it should ever be brought before your Lordships in a case in which it is necessary to come to a decision upon it. It does not appear to me to be necessary to enter into the discussion of that question now, being very distinctly of opinion that your Lordships will find quite sufficient upon the merits of the case to dispose of the appeal now before you, which merits may be very shortly stated.

A gentleman of the name of Fraser being entitled to receive certain sums of money from the trustees

of Colonel Williamson, and having transactions with the firm of which the respondent Dunnet is now the surviving partner, assigned his interest in those sums of money—his right to receive those sums—to the firm of which Dunnet is now the surviving partner, for the purpose of indemnifying them against certain obligations which they had come under for his, Fraser's, benefit, and which obligations are specified in the deed of assignment. It appears that a dividend of ten shillings in the pound was received by the house of which Dunnet is the surviving partner, and it appears that the house being in possession of this security, and therefore necessarily looking to receive these monies on account of Fraser, made certain advances in money to him, and furnished him with articles which he required, which raised a private debt as between the house and Fraser. After the first dividend of ten shillings in the pound had been paid to Dunnet, there being a further dividend expected to be received from Williamson's estate, the present appellant, that is, the person who is now represented in the present appeal, namely, Mr. Clyne, having also a demand against Fraser, arrests in the hands of Dunnet such monies as he might have belonging to Fraser, that is to say, such money as he otherwise would have to pay to Fraser, subject of course to all such demands as the house now represented by Dunnet would have against Fraser, because it cannot for a moment be contended that the party making the arrestment or arresting the fund could put the arrestee in a worse situation than he would have been in as against the party to whom he was bound to account. Whatever rights Dunnet had against Fraser he necessarily had

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against Clyne, who could only claim from Dunnet that which Dunnet would otherwise be bound to pay to Fraser.

This case came before the Lord Ordinary in the first instance, and the first interlocutor was pronounced on the 1st of December 1832; and by that interlocutor the Lord Ordinary appoints the defender Dunnet to put in a statement of the account between him and Fraser, showing, first, the balance that was due at the period of the first dividend; secondly, at the date of the arrestment; and, thirdly, at the period of the second dividend, the second dividend having been received at a period subsequent to the arrestment. The interlocutor of the 9th March 1833, which was made the subject of a reclaiming note by Mr. Clyne, was adhered to by the Court of Session; and this forms the foundation of all that followed; it establishes the right as between the parties; and what has afterwards taken place merely are the means by which that right is worked out. That interlocutor finds, first, "that in the accounting "between George Dunnet as arrestee, and David "Clyne, the former is entitled to take credit, in the "first place, for the amount of the debts and obliga- "tions in security and relief of which the assignation "to him by Fraser the common debtor was granted, "and all the expenses relating to these debts and "obligations;" that was secured and conditioned in the deed by which the debt was assigned to them; the second point is now made a subject of contest, being for all sums paid to or for behoof of and for all furnishings made to the common debtor prior to Mr. Clyne's arrestment in 1825; and, thirdly, for all sums which, though paid for behoof of Fraser the

common debtor after the date of the said arrestment, were paid in virtue of obligations contracted prior to the said date. The interlocutor further finds that Mr. Dunnet the arrestee is not entitled to credit for any advances or furnishings made to the common debtor subsequent to the date of the said arrestment, and not falling within the preceding finding. The result, therefore, is, that the interlocutor of the year 1833 declared that, as between the party arresting, namely, Mr. Clyne, and the arrestee Dunnet, in taking the account for the purpose of ascertaining upon what sum that arrestment ought to operate, Dunnet was entitled to deduct not only the particular sums specified in the assignation under which he claimed, but that he was also entitled to deduct all sums furnished by him,—sums paid, or furnishings, as they are called, to Fraser at the time when the arrestment was made; and that he was also entitled to set off against what might be found in his hands due to Fraser such sums as were paid subsequently, provided they appeared to have been paid by virtue of obligations entered into prior to the time at which the arrestment took place.

The only question, supposing this to be open now for your Lordships consideration — and I am anxious to show the parties that the decision of your Lordships House, if your Lordships agree with me in the opinion which I have formed, does not proceed upon matter of form, but that your Lordships have the facts so far before you, that if there were no objection in point of form, the decision to which your Lordships would come would be precisely the same — the question is, whether Fraser as against Dunnet could either have stopped the

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second dividend in the hands of the trustees of Williamson, or have compelled Dunnet to pay over to him, Fraser, monies which he had actually received, leaving Dunnet to obtain payment as he could of monies paid or furnishings supplied to Fraser anterior to the period of the arrestment, or subsequently, in consequence of obligations entered into before the arrestment. That no such law can exist in Scotland is manifest, not only from some of the authorities which have been referred to, but from the nature of things, because it is not a matter of set off; but here is a fund put into the hands of a certain party, and the person whose funds are so put into his hands induces him to advance monies, which, whether the subject of any special contract or not, are obviously advanced upon the credit which he is furnished with by means of the assignation, which puts into the hands of the party paying, funds belonging to the party to whom the monies are advanced, and which funds are to be accountable for that advancement of money. It might as well be said that a banker to whom monies or securities are given, nothing special being said upon the subject, can have these securities taken out of his hands without paying him the balance found due upon the money transactions between the parties. It does not, however, rest upon that, because Fraser himself is examined, (I shall presently consider how far that examination is correct, looking at the state of the pleadings between the parties,) and Fraser says that it was a matter of arrangement between the parties,—that he drew these sums, and was supplied with the furnishings, in consequence of the credit which he was to receive on account of money coming from those trustees. It is said that that statement of Fraser

ought not to prejudice the question now between the parties, because it is not made a subject of pleading. It did not arise upon the pleadings. The pleadings were these;— to what extent the plaintiff was entitled to receive the balance of the account pending between Fraser and Dunnet; and accordingly it is referred to an accountant for the purpose of looking into the account, and reporting what, at the various periods stated in the first interlocutor, was the state of the account between the parties. In taking that account Dunnet claims certain sums, to which sums he is to establish his title. It may as well be said, that in a proceeding for the purpose of taking the account, every item of account is the subject of a special plea. It arises necessarily in the investigation of the accounts; and in the investigation of the accounts, Dunnet, having claimed a right to retain a certain portion of the monies in his hands for the purpose of paying a certain obligation, proves his right, first by showing that he did advance the money to Fraser; and he establishes his title to it by showing that the money advanced to Fraser was upon the faith and credit of the money, of which he held an assignation. Therefore not only is there no dispute, but there is no contest raised at your Lordship's bar between the account as taken by the accountant and as acted upon; and the last interlocutor appealed from is not the subject of contest as to any item of account which it contained. A very different course of proceeding must have been adopted if it had been the intention of the appellant to appeal against particular items, but it is not attempted on the part of the appellants to bring before your Lordships a question upon the disallowance of any particular

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item; the appeal is for a different purpose, and not for the purpose of trying the question as to disallowing any particular sum. The interlocutor of 1833 laid down the principle upon which this account was to be taken, giving to Mr. Dunnet the benefit of all sums which he could show to have been advanced to Fraser, before the date of the arrestment, or subsequently, in consequence of obligations contracted before that time.

The cause was proceeded in down to the date of the last interlocutor, which was in the month of February 1837, without any appeal being brought before your Lordships, questioning the propriety of the principle established in the decree of 1833. Interlocutors in sufficient abundance appear to have been pronounced, eleven in number, all of which are made in part or in whole the subject of the present appeal: but against the principle established by the decree in March 1833, up to the time when this petition was presented, which I understand was in July 1837, no question was brought before your Lordships as to the propriety of the principle established in that interlocutor of March 1833. The result of all this investigation has been, that at the time of the arrestment there was nothing due to Fraser; I consider it to be established beyond all controversy that there was nothing that the persuer could claim against Dunnet, because whether there was a small balance or not in the hands of Dunnet, whether it was 7*l.* or 8*l.* in the hands of Dunnet actually exceeding the amount which at that time he had advanced and paid, he had at that time come under obligations binding himself to make payments at a future day to Fraser, to an amount exceeding that

which he had in his hands, whether it be considered one sum or the other; and it is impossible to say that the present party, who could not stand in a better situation as against Fraser, had any right to come against Dunnet to obtain a sum of money which he had in his hands in that state of circumstances. At the time the arrestment took place there was nothing in his hands. The whole suit proceeds upon the foundation of that arrestment; and the result of that investigation has been that a certain sum amounting to 30*l.* was at that time due from Dunnet, not however payable by him, because there was an obligation existing between himself and Fraser, which entitled him to be secured, and secured upon money in hand against the consequences which might follow upon that obligation.

My Lords, a question might be made, (but it is not necessary to consider that,) whether it was quite right to alter the security which the party had in his hands, and whether it was not giving the pursuer something more than the pursuer ought to have, an indemnity having been given in respect to which there was actual money in hand. The pursuer at least cannot complain of that; he has all that he could reasonably expect, and perhaps it may be thought that he had something more than he was strictly entitled to, but however that may be the money balance is found to be 40*l.*

Now, up to that moment nothing is complained of; no appeal is presented to your Lordships House. The parties from 1833 up to 1837 are proceeding upon the principle which established the right as between themselves, and now the amount of the account taken is not

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in dispute. What is it then that has given rise to this appeal, by which in 1837 the parties complained of an interlocutor of the year 1833 in which they had acquiesced from that time until the time when the appeal was presented? They are ordered to pay the costs. Now, I have a very strong opinion, that if these costs had been otherwise disposed of your Lordships would never have heard of the appeal from the interlocutor in 1833. And concurring entirely with these opinions which have been referred to, in which it has been stated that this House will not entertain an appeal for costs, it is indispensably necessary, in order to maintain that principle, that where parties appealing for costs in substance mix up their appeal with some other matter of merits, in order to cover the appeal for costs, they should not be permitted to escape from that rule by attempting to mix the one subject matter with the other. But, my Lords, I do feel some satisfaction in having heard so much of this case as not to be compelled to advise your Lordships to dispose of it upon that technical ground, because if you look at the liabilities of the parties to costs upon the merits, it seems to me that there is no question upon it, and that the Court below have done, with regard to costs, that which the justice of the case required. Mr. Dunnet has no connexion with the present appellant Mr. Clyne; his transactions were entirely with Fraser. It is for the purpose of a benefit to Clyne that he is permitted to come upon the fund in the hands of another person, and he cannot come upon this fund to the prejudice of that other person; he cannot take money which that other person is entitled to retain, or expose him to a liability for costs to which he would

not have been exposed but for the intervention of a stranger.

Now, I have already said, that at the time of the arrestment he had nothing coming. It turns out that by means of a subsequent dividend, not by means of any thing which he had at that time, but subsequently, he had something which, whether Fraser received or Clyne, his (Dunnet's) demand being satisfied, was a matter of indifference to him. But till that moment, till his demands are satisfied, he is not in a situation to be compelled to part with this money to the one party or the other, for he has still in him a right to look to that money, or any other he may receive to secure him from any liability which he may have come under to Fraser; and it is only on the condition of relieving himself from that liability that he is entitled to retain the sum of 40*l*. Then what has the interlocutor done with regard to costs, so far as these parties are concerned. I am looking to Dunnet only. Why, so far as these parties are concerned, it has said that Dunnet was entitled retain this money, he being the stakeholder as between Fraser and Clyne, who was claiming as against Fraser, and he, Dunnet, being involved in litigation merely because he had in hand a fund which was, so far as regarded the surplus, payable to Fraser's creditors. The only subject of contest is with respect to this balance, which he is compelled to part with upon the performance of a certain condition. That condition never having been performed, he was never in a situation to part with it; and all that the interlocutor provides is, that he shall not be put to expense and to costs by proceedings not arising out of his own act, but arising out of the act of the pursuer, who is seeking

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a remedy which incidentally involves him, Dunnet, as the stakeholder of the fund in question. My Lords, it appears to be quite a matter of course, and according to the justice of the case, and according to every principle by which courts regulate their proceedings as to costs, that the stakeholder should be indemnified against the expenses which the litigation had occasioned, and with which he had nothing to do beyond securing himself from the liability arising out of obligations totally independent of the party claiming, namely, Mr. Clyne.

Then, My Lords, there are parties before us here, who have much less to do with it than Dunnet, namely, the parties from whom the monies were to proceed, which Dunnet by his assignation was entitled to. These were monies that Fraser in the first instance was entitled to; Fraser's right to receive those monies had by him been assigned to Dunnet. Why are Williamson's trustees to be involved in that question? the party to whom they were bound to pay had by his assignation directed them to pay to another, and to Dunnet they had a right to pay. I do not, therefore, see why it was necessary to keep those parties before the Court; but having been brought to your Lordships bar as respondents, it appears that they have done only that which the person to whom they owed a duty, namely, Fraser, ordered them to do; they have paid to Dunnet that which Dunnet was entitled to receive by virtue of the assignation and obligation which on their part existed at the time when this claim was first made. They have done no more, therefore, than perform the duty which was incumbent upon them; they have paid the party as between themselves that which he was entitled to

receive; then the appellant brings them here without any thing to ask as against them, because he does not ask for the 40*l.* against them, but for the 40*l.* against Dunnet, so far sanctioning the receipt by Dunnet of that which Williamson's trustees have paid. On this ground, therefore, I also think it is quite clear that the Lord Ordinary, though that is not made the subject of any complaint, has done quite right in not making the parties pay the costs. The Lord Ordinary gave neither party their costs; he seems to have found (but it is not necessary to enter into that) there was some reason which should preclude these parties from having those costs. The complaint is, that they ought to have been made to pay costs, and I think that the pursuer has very good reason to be satisfied with that, so far as regards Williamson's trustees.

The other question, as to denying those costs, is not now under your Lordships consideration; it is quite sufficient therefore to say that the interlocutor appears to be quite right, at all events in not ordering costs.

My Lords, this exhausts all the points to which it is necessary now to advert. If your Lordships agree with me in the views that I take, your Lordships will affirm the interlocutor with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant: And it is further ordered,

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That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP—SPOTTISWOODE and ROBERTSON, Solicitors.

[*28th February* 1839.]

(Appeal from Court of Session, Scotland.)

Sir CHARLES HALKETT, Appellant.[1]—*Sir William Follett* —*H. Robertson.* (No. 3.)

The TRUSTEES of the late WILLIAM NISBET and others, Respondents.—*Attorney General* (*Campbell*)—*Solicitor General* (*Rutherfurd*)

Service — Entail — Teinds (Augmentation of Stipend) — Warrandice.—A. being infeft in an entailed estate, and becoming afterwards entitled to another entailed estate, devolved the first to his brother under burden of debts, for which it was afterwards brought to sale by his brother's apparent heir. Neither entail contained the statutory fetters against alienation and contracting debt. Upon A.'s death, B. his son was served lawful and nearest heir of line, taillie, and provision to him, in special, in the estate last above mentioned, and was infeft therein accordingly: Held (affirming the judgment of the Court of Session) that B. was liable in an obligation of warrandice against future augmentations granted by an ancestor of A. in the first-mentioned estate.

Practice.—Additional printed cases having been lodged by permission of the Court, without objection, containing a ground of action not originally founded on: Per L. C. A Court of Appeal will not readily listen to an objection of this kind, not made in the Court below, if it appears from the whole case presented to said Court, that no injustice has been done.

IN the year 1682 John Wedderburn, then of Gosford, sold to Sir John Nisbet of Dirleton the lands, lordship,

2D DIVISION.

Lord Ordinary Medwyn.

[1] 13 S. D & B. 497.

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and barony of Innerwick, and others, with the parsonage and vicarage teinds of the same, being a part of the parsonage and vicarage teinds of the parish kirk and parish of Innerwick, which of old were part of the patrimony of the abbey of Paisley, and thereafter pertained to James Earl of Abercorn as part and pertinent of the lordship of Paisley, together with the advocation, donation, and right of patronage of the said parish kirk and parish of Innerwick.

The disposition contains this clause: "And in regard "the foresaid teinds are disponed by me for the "same price that I got for the stock, therefore I bind "and oblige me and my foresaids to warrant the "foresaid teinds, parsonage, and vicarage of the lands "and baronies above disponed from all future augmen- "tations of ministers stipends or schoolmasters sala- "ries, and from all annuities of teinds payable to his "Majesty or his donators," &c. &c.

John Wedderburn (afterwards Sir John Wedderburn) was succeeded by his next brother Peter, afterwards Sir Peter Wedderburn, Bart., who married Dame Janet Halkett of Pitfirrane.

In September 1706 Sir Peter and Dame Janet Halkett executed mutual taillies of their respective estates of Gosford and Pitfirrane in the form of procuratories of resignation.

The entail of Lady Halkett's estate of Pitfirrane proceeded on the narrative, that it was granted "for "certain onerous causes, good respects, and con- "siderations me moving," &c.; and therefore Lady Halkett with consent of her husband, granted procuratory for resigning her estate of Pitfirrane for new infeftment to be granted to herself and husband, and

longest liver of them, in life-rent, and to Peter Wedderburn their eldest son in fee, and to the heirs male of his body; which failing, to the daughters or heirs female of his body successive without division; which failing, to their second son and the other substitutes therein specified, under provisions, and conditions,—first, of assuming and bearing the surname, title, and arms of Halkett of Pitfirrane; secondly, that the estates of Pitfirrane and Gosford should be kept separate and disjoined, or if they should coincide in one heir, provision was made for their separation in the succeeding heirs; and, thirdly, a prohibition to alter or infringe the taillie, and an irritancy in case of contravention.

By the other entail, executed in 1706, Sir Peter Wedderburn, then called Sir Peter Halkett, granted procuratory for resigning his estate of Gosford in favour of himself in life-rent, and Charles Wedderburn his second son in fee, and the heirs male of his body; whom failing, to the daughters or heirs female of his body without division; whom failing, to James Wedderburn his third lawful son, and the other substitutes therein specified. The clauses in this taillie are the same as in the taillie of Pitfirrane, mutatis mutandis.

There was a provision in the taillie of Gosford for the separation of the two estates in the following terms:—

"In case failing of the said Peter Wedderburn and the "heirs of his body, the said estates shall happen to "coincide and be united in the person of the said "Charles Wedderburn, then and in that case it shall "be in the option and election of the said Charles "either to keep, hold, or retain his right and posses-"sion of the said estates of Gosford, in which case he shall be holden and obliged to denude himself, omni habili

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modo, of the said estate of Pitfirrane," &c. in favour of the said "James Wedderburn and the other heirs of "taillie and provision substitute to him, with and under "the haill conditions and provisions contained in the "foresaid taillie thereof; or otherwise it shall be leisom "to the said Charles to enter to the right and posses- "sion of the said estate of Pitfirrane and others con- "tained in the foresaid tailzie thereof, in which case "he shall be holden and obliged to denude himself of "the said estate of Gosford and others above written "contained in this present tailzie, haill rents, &c., "from the time of the succession foresaid, omni habili "modo, in favour of the said James Wedderburn," &c. &c.

And providing that the "said Charles shall make his "election of the said estate of Pitfirrane within the "space above appointed, then and in that case it shall "not be leisom nor lawful to him to burden and affect "the said estate of Gosford, or his succession therein, "with any debts or deeds to be contracted or done by "him the said Charles after the right of succession "to the said estate of Pitfirrane happens to devolve, "viz., after the decease of the said Peter Wedderburn, "the said James being always bound and obliged to "free the said Charles and to disburden the estate of "Pitfirrane of any debts or deeds contracted or done "by the said Charles during his remaining in the right "of the estate of Gosford before the right of succession "to the estate of Pitfirrane be devolved on him as "said is," &c.

The statutory fetters against alienation and contracting debt were not inserted in either of these entails.

In 1725 Sir Peter executed a disposition in favour

of Charles, proceeding on the narrative that he had thought fit, for the better preservation of their name and family, to settle Gosford on Charles, and the heirs of his body, in manner mentioned in the bond of taillie, and that he had disponed to Peter, his eldest son, his furniture, &c. at Pitfirrane, with the rents of Pitfirrane due at his death, and various other sums, for the payment of certain debts specified in the disposition; and that it was just and reasonable that he should also secure Charles in the goods, &c. after assigned "for "the better enabling him to pay my debts, wherewith "I have burdened him in manner after specified;" he therefore assigns to Charles and his heirs several bonds and sums, among which there was a wadset for 62,000 merks over Dirleton, besides all debts and sums of money "which pertained to Sir P. Wedderburn, my father, "or John Wedderburn, my brother; it being specially "provided and declared, that the said Charles Wedder- "burn and his foresaids, by their acceptation hereof, "are and shall be burdened with, and bound and "obliged to pay, my haill just and lawful debts that "shall happen to be resting at the time of my decease, "excepting allenarly in so far as the said Peter Halkett, "my eldest son, stands bound to pay by a bond of "relief granted by him to me."

Dame Janet Halkett was succeeded in 1713 by her eldest son Peter, afterwards Sir Peter, who married Lady Emilia Stuart, daughter of the Earl of Moray. A charter and infeftment were expede upon the procuratory in the entail of Pitfirrane, in favour of the said Sir Peter Wedderburn; and thereafter Sir Peter and Lady Emilia executed a post-nuptial contract of marriage, whereby he granted procuratory for surren-

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dering the estate of Pitfirrane "to himself and his "heirs male already procreated or to be procreated "betwixt him and the said Lady Emilia Stuart and "the heirs whatsoever of their bodies; whom failing, "to the heirs male of the said Peter Halkett, &c.; "whom failing, to the other heirs of tailzie appointed "to succeed by the above tailzie of Pitfirrane, 1706."

Of this marriage there were three sons; viz., first Peter, second Francis, third James. Peter the eldest son being fatuous, his father, Sir Peter, executed in 1751 a new entail of his estate upon Francis his second son, and the same series of heirs, and under the same conditions as in the taillie of 1706.

Sir Peter the father was killed in America in the year 1755; and upon his death his second son then Major Francis Halkett expede a charter and sasine of the estate of Pitfirrane in his favour, in virtue of the procuratory contained in the entail of 1751, and continued to possess the estate till his death in 1760 without issue. His youngest brother James died two years before him, in 1758, also without issue. Thus all the family of Sir Peter Halkett and Lady Emilia Stuart became extinct, except the eldest son, Sir Peter, who was fatuous.

Charles the second son of Sir Peter Wedderburn and Dame Janet Halkett his wife, succeeded to Gosford, and had two sons, John the father of the appellant, and Henry father of Lady Cumming.

Charles Wedderburn died in 1754, without having made up titles. A charter was then expede upon the procuratory in the entail of Gosford in favour of the appellant's father John Wedderburn, afterwards Sir John Halkett, on which charter he was infeft in Gosford in

1754. In the following year he sold part of the estate for £8854, and he retained possession of the remainder till the death of his cousin Major Francis Halkett of Pitfirrane in 1760. He then claimed Pitfirrane as heir under the second entail, but his succession was suspended by a decree of reduction of that entail at the instance of Sir Peter Halkett, who was cognosced, and his tutor at law.

The decree of reduction having been reversed upon appeal, and Sir Peter having died about the same period, John Wedderburn made up titles to Pitfirrane, and executed a deed of devolution of Gosford in favour of Henry, and he also conveyed to him the above mentioned wadset over Dirleton for 62,000 merks, but subject to a reserved security over said estate of Gosford, and wadset for relief of the debts attachable thereto.

Henry Wedderburn died in 1777, when the estate of Gosford was brought to judicial sale by his apparent heir Lady Cumming. John Wedderburn, then Sir John Halket, ranked upon the estate for the debts above mentioned, and he also obtained a reconveyance of the wadset. The balance of the price of Gosford, after satisfying these debts, with interest, was carried off by a creditor of Henry.

In 1793 Sir John died, having executed a conveyance to trustees for payment of debts of his whole estate and effects, with the exception of Pitfirrane and furniture, &c. pertaining thereto; and in the following year the appellant expede a special service, and was retoured as "legitimus et propinquior hæres lineæ, talliæ, et "provisionis speciali dicto demortuo Domino Joanni "Halkett de Pitfirrane, baronetto, patri suo, in totis et

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" integris dictis terris et baronia de Pitfirrane," &c., and soon afterwards he was infeft in said estate on a precept from chancery proceeding on the said retour, and his infeftment duly recorded.

The lands of Innerwick continued in the Nisbet family without any augmentation of the stipend until the year 1790, in which year, and subsequently in 1807 and in 1813, augmentations were granted, and a portion of each was finally localled upon the lands of Innerwick in 1825. The excess of stipend having been paid by Mr. Nisbet during his life, and after his death by his daughter and heiress the respondent Mrs. Ferguson, her trustees, along with himself and husband, in 1832, raised an action of relief against the appellant under the warrandice contained in the disposition of 1682. The Lord Ordinary having made avizandum to the Lords of the Second Division, their Lordships, after allowing additional Cases, (in which there was urged for the first time without objection the reconveyance of the wadset in connexion with the deed of 1751 as a further ground of representation,) pronounced the following judgment on the 20th February 1835:—

Judgment of Court, 20th Feb. 1835.

" Decern in terms of the libel as to the pursuer's (the " respondent's) right of relief, and remit to the Lord " Ordinary to ascertain the amount of the sums due, " and to proceed as his Lordship shall deem just, and " decern; but find no expenses hitherto incurred due " to either party."

The appellant appealed.

Appellants Argument.

Appellant.—The defence chiefly relied upon by the appellant is, that he does not represent the granter of the

disposition in 1682, so as to be liable in the obligation contained in it.[1] The appellant in no shape represents John Wedderburn, the granter of the obligation in 1682: he has inherited none of his property; he has made up no title as his heir; and therefore it is impossible on this ground to maintain the present claim against the appellant.

The facts are not disputed; and it is not alleged that the appellant, either at the present period or at any time, inherited or enjoyed any part of the property belonging to the Wedderburns of Gosford.

An important distinction exists between the present case and every other which has hitherto occurred in Scotland relative to relief from augmentations. There have been several such cases, in which severe and unexpected claims have been sustained under ancient obligations; as, for example, in the case of the trustees of the Earl of Aberdeen against the Trustees of Lord Belhaven[2], where a claim of relief was sustained in 1821 on an obligation of warrandice dated ninety years before; and in the case of Justice against Callender[3], where effect was given to a similar claim at the distance of eighty years. But in these and all the other cases of the same kind which have occurred, there was property of the original obligants extant, which fell justly to be subjected for his debts and obligations, if these were onerous and effectual in law.

The present is entirely a different case; the appellant neither is nor ever was in possession of any property of

[1] Horne v. Sinclair, 23d Jan. 1835, 13 S., D., & B., 296.
[2] Shaw's Rep., 22d Nov. 1821.
[3] Shaw's Rep., 1st Dec. 1826.

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the original obligant; on the contrary, the whole of his property was carried off by legal attachments of the creditors of the heir last in possession of Gosford, upwards of fifty-two years prior to the institution of the present suit.

It has been urged by the respondents that, whatever may be the succession or inheritance of the appellant, at least his father Sir John Halkett intromitted with property and funds of the Wedderburns to a large amount; and it was further assumed that the appellant represents his father universally, and so is liable to the same claims that his father would have been.

But the appellant denies expressly that he represents his father universally, and no sufficient evidence has been produced or referred to in order to fix such representation on the appellant; nor have the respondents attempted to shew that the appellant on his father's death took up any property from him (Sir John), other than the lands and estate of Pitfirrane, which was destined to and tailzied upon the heir male of the family, under the deeds of tailzie and provision before specified. On the contrary, the appellant stated on the record that his father Sir John Halkett, prior to his death, "conveyed all his property, heritable and "moveable, to trustees, excepting always 'the entailed "'estate of Pitfirrane, thereby expressly reserved from "'the trust' for payment of the various debts, annui- "ties, and provisions which he became bound to pay. "He also excepted the household furniture, bed and "table linen, books and plate, and farm stocking of "Pitfirrane, which he conveyed to the defender; but "this was under burden of his paying such balance of

" his debts and annuities as the trust funds and estate " might be insufficient to answer; and that balance " far more than absorbed the moveables assigned to " the defender."

The respondents' plea is of a technical and very rigid nature; viz., that he was served and retoured " ut " legitimus et propinquior hæres lineæ, talliæ, et pro- " visionis in speciali, dicto demortuo Domino Joanni " Halkett de Pitfirrane, baronetto, patri suo, in totis " et integris dictis terris et baronia de Pitfirrane," &c. It has been argued, that the terms of the retour fix indelibly on the appellant the character of universal heir and representative of his father Sir John Halkett. But if the whole scope of the instrument be carefully taken into view in connexion with the subject matter to which it refers, it will be seen that the appellant was not served as a universal representative, his service was a special service in the lands of Pitfirrane only, connecting him with the tailzie executed by his great grandmother Dame Janet Halkett, and with no other right; it never was intended to have, and in point of fact has not, any other effect than simply to vest a title in the appellant as heir of tailzie and provision in the estate of his great grandmother Dame Janet Halkett.

The question then is this, Whether a special service as heir of line, tailzie, and provision to an ancestor in certain lands descending to heirs of tailzie where the ancestor left no property descendible to heirs of line, and where, even if he had left such property, the heir would have been bound to have made it over to trustees of the ancestor, subjected the heir so served universally to the ancestor's debts? The appellant conceives that

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such severe responsibility is opposed to every principle and authority in the law of Scotland.[1]

Respondents.—John Wedderburn, the granter of this warrandice, was succeeded by his younger brother Sir Peter Wedderburn, who in the year 1688 made up titles to him by service as his heir of line, thus unquestionably representing him in all his debts and obligations.

As heir of provision in Gosford, Charles would assuredly have been liable, supposing the warrandice to have been brought into operation during his possession, at least to the value of that estate; and, as grantee under a general disposition with the express burden of debts, his liability must have been held to extend to all the obligations of his father; for, whatever may be the case of an ordinary simple disposition, omnium bonorum, the insertion of a clause burdening generally with all debts must, if it be allowed any force at all, be effectual to create an universal liability. It is, in fact, a contract between the parties, whereby the receiver of the right, in consideration of the benefits which he obtains, engages to become responsible for all the granter's debts, without limitation or restriction of any kind. It is in this manner and in this sense that the respondents maintain that Charles Wedderburn was his father's general representative, and liable for his debts and obligations.

If the liability was once clearly in Charles, by what-

[1] Maitland of Pitrichie, 1757, Mor. 11166; Blount v. Nicholson, 26th Feb. 1783, Fac. Col. 9. 159. No. 100., Mor. 9731; Lord Fife v. General Duff, March 1828, 6 S. & D. 698.

ever title or on whatever grounds established, it is obvious that in order to transmit it against the appellant, no more can be required than to shew that he stands related, by service as heir of line, taillie, and provision, to a party who was Charles's universal representative.

Now the intermediate person who formed this link of connexion was Sir John Halkett the father of the appellant, and who was Charles's eldest son, and made up titles by a general service to him as heir of line, taillie, and provision, thereby at once establishing in his person a right to the unexecuted procuratory in the settlement of 1706, upon which he obtained a charter and was infeft, and at the same time fixing upon himself the character of his father's universal representative. In this way he not only became liable, as Charles's heir of line, for all the debts which he had contracted, but, by taking directly as heir of provision of his grandfather Sir Peter under the investiture of Gosford, he incurred a clear representation of that party also, and a consequent liability for all his debts and obligations; and thus, when he succeeded to Pitfirrane he united in himself every ground of representation, whether derived through the line of the eldest or of the second son of Sir Peter and Lady Halkett. He died in the year 1793, and was succeeded by his son Sir Charles, the present appellant, who made up titles to him by special service as nearest and lawful heir of line, taillie, and provision; and the only question that remains in this case is, whether Sir Charles thereby represents his father to the effect of being liable in this obligation. He took Pitfirrane as his father's heir of taillie and provision, a character in

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which it seems impossible to deny that he represents him, and is answerable for all his debts and obligations, from whatever source derived, at least to the value of the succession. There is no proposition more absolutely fixed in the law of Scotland, than that an heir of provision under any settlement short of a strict entail, is liable to that extent. But it is not contended that the settlement under which Pitfirrane has descended to the defender is at all of the nature of a strict entail; it is, in reality, a simple destination, not containing any of the usual prohibitions against selling and contracting debt; and this is most material in a question of representation. Sir John Halkett's creditors might have carried off the estate by diligence, or he might have charged it with his debts, or sold the whole of it, without risk of challenge from any of the substitutes; and shall it be said that, because, instead of allowing it to be affected in any of these ways, he has chosen to transmit it entire to his son, it is no longer to be liable in that son's person for any of the father's debts or obligations? The debts of the ancestor, so long as they remain undischarged, must be burdens upon his successors and the estate which they inherit; and it matters not in what way these debts may have originated, — whether in the act and deed of the last predecessor himself, or of some remote party, a stranger, possibly, in blood to him, but with whom he is connected by a progress of titles through intermediate heirs; and the only point to be looked to in a question with a creditor is, whether it was truly an obligation on the predecessor or no. If that point be fixed, the liability which attached to him is transferred to his heir, and the estate, if not protected by the sanctions

of a strict entail, must be answerable for the debt to the last farthing of its value. Upon these facts, and under these circumstances, the respondents contend, that, as heir of line and intromitter with the moveable estate, Sir Charles represents his father universally; and even as heir of provision in the estate of Pitfirrane he is liable to the full value of the succession.[1]

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, the only point in this case which requires particular observation is, whether the appellant Sir Charles Halkett is liable to the obligation of warrandice entered into by Sir John Wedderburn in 1688; for of the respondent's title under it there does not appear to be any doubt, notwithstanding the defences which were set up against their claim.

Sir Peter Wedderburn, the brother of Sir John, was served heir to him as heir of line; he therefore, by the law of Scotland, was clearly liable to all the obligations of Sir John, and amongst others to the warrandice in question without regard to the value of the property he inherited. Sir Peter settled the estate of Gosford upon his second son Charles; another estate, Pitfirrane, the property of his wife, being settled upon his eldest son. He also settled other property, including a wadset right to £2,000 merks Scots, which had remained unpaid of the purchase money upon the sale of the estate as to which the warrandice had been given, upon his son Charles, upon condition of Charles taking upon himself the payment of all his debts. Charles, upon Sir Peter's

[1] Stair, b. i. tit. 7. sec. 13.; Gordon v. Maitland of Pitrichie, 1st Dec. 1757, Fac. Col. 2. 101. No. 63., Mor. 11161; Blount v. Nicolson, 26th Feb. 1783, Fac. Col. 9. 159. No. 100, Mor. 9731.

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death, entered into possession of and enjoyed the Gosford estate and the other property, including the wadset, till his death, but did not make up titles to the estate. Upon his death in 1754 his son John made up his title by a general service to him as nearest heir male of line, of taillie, and provision, and succeeded to the estate of Gosford and the other property settled, whereby he became heir of provision to his grandfather the entailer, and universal representative of his father Charles. He afterwards sold part of the estate to Lord Elibank for 8,855*l.*

At a subsequent period, namely in 1770, Sir John was infeft in the lands of Pitfirrane, which had been enjoyed by the sons of the eldest son of Sir Peter Wedderburn. Both estates being thus united in Sir John Wedderburn, he surrendered Gosford to his younger brother Henry, and assigned to him the wadset for 62,000 merks. He took upon himself all the obligations to which Sir John was subject, as had been provided for in the original settlement of Gosford. Upon the subsequent bankruptcy of Henry 17,205*l.* was claimed and allowed to Sir John on that account, and the wadset was again assigned to him in part satisfaction of that sum.

This state of circumstances seems to leave no doubt of the liability of Sir John the defender's father to the obligation in question. Upon his death the defender was served heir of line, taillie, and provision to his father, and succeeded to Pitfirrane and the other property, which imposed upon him the liability to all the obligations to which his father had been subject, and amongst them to the charge in question, although the event which has occasioned the demand had not then

occurred. The estate of Pitfirrane, to which the defender succeeded, though subject to a destination, was not secured against a sale or the contracting of debts by the party entitled.

It was contended that the judges below were not justified in founding their judgment upon these circumstances, inasmuch as it was not properly put in issue that Charles the son of Sir Peter had taken upon himself his father's debts, or that Sir John, upon the sale of Gosford, received part of the proceeds, and that the deed of the 27th of October 1725 was not in issue. This objection, it was said, was not relied upon below; and it appears, in the case laid before this House on the part of the appellant, that, upon the production of the documents relied upon to prove these facts, permission was given to both parties to add to these cases, and the appellants accordingly prepared an additional case with reference to those documents, in which the objection to their admissibility upon the ground of their not being in issue does not appear. A Court of Appeal will not readily listen to an objection of this kind which was not made in the Court below, and in a case in which it appears that no injustice has been done, both parties having had and having availed themselves of the opportunity of discussing the facts alleged not to be regularly in issue.

It is true the ground upon which the defendant's liability is now contended for differs materially from the grounds insisted upon by the pleas in law, inasmuch as the documents produced in the progress of the cause, and which form the substance of the additional cases, shew that Charles the son of Sir Peter, when he took the

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Gosford estate, took also the wadset and other property, and by the acceptation thereof he and his heirs and assigns whatsoever became burdened with and bound and obliged to pay all the debts whatsoever of Sir Peter which might happen to be existing at the time of his decease; for such are the words of the disposition and assignation of 27th October 1725. The debts and obligations of Sir Peter, of which the warrandice in question is one, became the debts and obligations of Charles, and Sir John the son of Charles was his heir, and made up his titles as heir of line and provision to him, and the defender was son and heir to his father, and made up his title as heir of line to him. So that if the obligations in question became the debt of Charles, the liability of John his son and heir, and the defender his son and heir so claiming titulo universali, seems sufficiently clear.

It is however to be observed that these additional facts are no more than additional evidence to prove the representation upon which the pursuer founded his original claim, and that if they are to be considered as raising a new ground of claim, they were by leave of the Court made the subject of additional cases on each side; and although the fact of their not being in issue is stated in the additional case of the appellants, no objection appears to have been raised or relied upon below upon that ground, but each party having exhausted their observations and arguments upon those additional documents, the judgment of the Court was taken upon the whole case. Under these circumstances I cannot suppose that your Lordships will think it right to give any weight to this objection; but, if

satisfied of the liability of the defender upon the whole of the case, that your Lordships will think it right to affirm the interlocutor appealed against, with costs.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutor, so far as therein complained of, be and the same is hereby affirmed, with costs.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Solicitors.

[18*th March* 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 4.) JAMES FARQUHAR GORDON and others, Trustees and Executors of the deceased DAVID CLYNE, Appellants.—*Tinney—James Russell.*

DAVID CLYNE (poor), Respondent.[1]—*A. Haldane.*

Death-bed.—A party, in the event of his predecease, made a conveyance to his parents and the survivor, whom failing, to any persons whom he might name, whom failing, any person they might name. His parents predeceased him, leaving a trust conveyance of their whole property in favour of trustees named. He thereafter executed a deed on death-bed, conveying his whole estate to trustees named, declaring the purposes, and revoking all former settlements so far as they interfered therewith.—Held (affirming the judgment of the Court of Session) that the first deed, neither singly, nor taken in connection with the second deed, was effectual to disinherit the heir, and that the death-bed deed could not be coupled with the first, or with the first and second deeds, so as to exclude a challenge of it by the heir.

Practice.—In a reduction the defender pleaded certain pleas, which he designated preliminary. A record was ordered to be made up on these pleas, upon which the defender reclaimed, when the Court (on the ground that the defences pleaded as preliminary were the only defences pleadable in causâ upon which it might be necessary to make up a record) adhered. The record was then prepared, and the defender repeated his former pleas, but without again designating them as preliminary. The Lord Ordinary "repelled the dilatory defences,"

[1] 15 D., B., & M., 911.

reserving a question arising out of these pleas to be discussed with the defences on the merits, and found expenses due. On reclaiming, the Court adhered. Held, that an appeal against the judgment was competent without leave of the Court.

Execution Pending Appeal.—Incompetent to appeal against a warrant of the Court of Session for interim execution and payment of costs, so as to stay execution of such order as has been thereon made.

Pauper— Costs.—No objection to a warrant for interim execution that a printed copy of the petition has not been laid before each of the Judges, nor is it an objection to such warrant for payment of costs, that the party obtaining the warrant has sued in formâ pauperis, and that his own agent alone signed the bond of caution.

Pauper.—A respondent suing in formâ pauperis, allowed to be heard on presenting his printed cases at the bar, but costs refused him on that account, although there were otherwise sufficient grounds for awarding them in his favour.

2D DIVISION.

Lord Ordinary Cockburn.

ON the 22d of August 1815 the late Mr. David Clyne, S. S. C., executed a disposition whereby, in the event of his predeceasing his parents without leaving lawful heirs of his body, he gave, &c. &c., to and in favour of William Clyne his father and Margaret Swanson his mother, "during their mutual lives, and the longest "liver of them two; and after the death of the longest "liver, to and in favour of any person or persons, or "for such uses, ends, and purposes, as I (Mr. Clyne) "may name and appoint by any deed I may execute "at any time of my life, and even on death-bed; and "in case of my dying without having executed such "deed, then to and in favour of such person or persons "as shall be named and appointed in any deed that "shall be executed (according to law or agreement

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" between themselves in such deed) by my said " parents, and for the same uses, ends, and purposes, " with the same powers, and under the same provisions " and declarations; which deed of theirs, when so " executed, I do hereby declare shall form a part " hereof, and that this my deed shall be as effectual " for conveying my whole means and estate, and " regulating the succession to the same, in the same " way and manner as shall be appointed by the said " deed of my parents as if their said deed were already " executed and herein copied verbatim, any law or " practice to the contrary notwithstanding." The deed then proceeds to convey his whole estate, heritable and moveable, real and personal, wherever situated, and of whatever description, which then belonged, or which might belong to him at the time of his death; and he farther appointed them (his parents) and the foresaid persons to be named by himself, and failing such nomination, the persons to be named by his parents in their deed, his sole executors and intromitters; and containing other usual clauses, with a reservation of full power, at any time of his life, to revoke, alter, or innovate, in whole or in part, as he might think fit, and in so far as not altered or revoked should be valid and effectual, and dispensing with the delivery.

On the 13th September 1815 Mr. Clyne's father and mother executed a mutual trust disposition and settlement, by which, on the narrative of the love and affection which they had to each other, and to David Clyne, S. S. C., their only surviving child, and for other causes and considerations, they with consent severally give, grant, assign, dispone, convey, and make over to and in favour of each other during their lifetime, and to the

longest liver, and after the death of the longest liver to and in favour of the said David Clyne, and the heirs of his body, and his assignees, whom failing, in favour of certain other persons as trustees, for the uses, ends, and purposes therein mentioned, their whole estate, heritable and moveable, and all their other property and effects, and, inter alia, for the purpose of converting their effects into cash, and after deducting debts and expenses, with instructions to divide the produce into ten parts, whereof one tenth part was declared to be payable to the children of the deceased Alexander Clyne, late tenant in Sordale, of which family the respondent is the eldest son.

The deed contained the following reservations:— "Reserving to us and the survivor of us, at any time "of our life, to appoint, as we may see fit and necessary, "other persons as trustees for the purposes aforesaid, "either in addition to or in room and place of the "trustees before named, which trustees so to be named "shall have the same powers as the trustees herein- "before named, &c.; and farther reserving full power "and liberty to them and to the survivor, but only "with the express advice and consent of the said David "Clyne, and not otherwise, at any time of our lives, "and even on death-bed, to alter, innovate, or revoke "the same in whole or in part, and declaring that any "alterations we may make, if done by a regular "writing subjoined hereto, or by a paper apart, shall "be as valid and effectual as if they were engrossed in "this deed, under which declarations these presents "are granted, and not otherwise." Then follows the usual clause declaring the deed valid, in so far as not altered, and dispensing with delivery.

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To this deed a codicil was subjoined, bearing to be subscribed by Mr. Clyne's parents and himself, who also wrote it, dated the 30th October 1826, whereby the said "William Clyne and Margaret Swanson, with "mutual advice and consent, and with the express "advice and consent of our son David Clyne," nominated and appointed three trustees in room of two who had died, and one whose appointment was thereby recalled; and they also, with advice and consent before mentioned, revoked and altered the bequest of one tenth share of their estate, and appointed it to be distributed in proportion to the remaining shares.

On the 1st November 1833, Mr. Clyne executed a trust deed of settlement, which proceeded on the following narrative; viz. — "Considering that circum- "stances have occurred to render necessary various "alterations in the settlement of my means and estate "since the deed of 22d August 1815 years was exe- "cuted by me, and also since the death of my mother "on the 15th day of January 1828, and the death "of my father on the 30th day of December 1829 "years; I do therefore hereby, and for other good "causes and considerations me hereunto moving, give, "grant, assign, dispone, convey, and make over to and "in favour of the appellants and to the survivor or "survivors of such of them as should accept, the major "part alive and accepting being a quorum, and to "such other person or persons as they or I myself may "afterwards appoint as trustees," his whole means and estate, and particularly a house in Albany Street, therein specially described, for the uses, ends, and purposes therein mentioned, and, inter alia, for payment of an annuity of 10*l.* sterling to the appellant.

The deed concluded with the following clause:— "And I do hereby revoke and recall the foresaid "settlement executed by myself on 22d August 1815, "and another settlement executed by me in voluntary "concurrence with my parents upon the 30th day of "October 1826 years, and all other deeds and settle- "ments, if any, in so far only as they interfere with "the present deed," reserving power of alteration, but declaring always that the same, in so far as not altered, should be valid and effectual.

The deed contained also the following clause:— "But if any of the smaller annuitants or legatees "should alter or attempt to alter this deed, in whole "or in part, by action or otherwise, in any Court "whatever, it is hereby expressly provided and declared "that such party or parties so attempting to alter or "repudiate shall ipso facto amit, lose, and tyne all "right and interest whatever hereby conferred upon "them, and the residue shall go in manner already "pointed out by me in the present deed."

Mr. Clyne died on the same day on which the above deed of settlement was executed, and in April 1835, the respondent, who is the cousin and heir of conquest of David Clyne, having been admitted to the benefit of the poor's roll, brought an action of reduction of this deed of settlement on the head of death-bed, in so far as the heritable property was concerned, against the appellant and the other trustees and executors of Mr. D. Clyne.

In defence the appellants set forth three pleas, all of which they designated as preliminary: 1. Want of title, in respect the respondent was concluded by the deeds of 1815. 2. Want of interest, in respect the value of

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the heritage was less than what he took under the deed attempted to be reduced. 3. That the said deed was executed in virtue of reserved powers in the deed of 1815, and so not liable to challenge. The Lord Ordinary having ordered condescendence and answers, the appellants reclaimed to the Second Division of the Court, when their Lordships (20th November 1835) pronounced this interlocutor: — "The Lords, &c., in "respect it is admitted by the defenders that the deed "under reduction was executed on death-bed, and that "it appears the defences now pleaded as preliminary "are the only defences pleadable in causâ upon which "it might be necessary to make up a record, adhere "to the interlocutor complained of, refuse the desire "of the note, and remit to the Lord Ordinary to "proceed accordingly."

Condescendence and answers were then given in, and the appellants repeated the three preceding pleas in law, with the addition of a fourth, simply to the effect that the pleas of the respondent being groundless, the action should be dismissed, but he did not designate any of these pleas as preliminary. The record being closed, and printed cases afterwards lodged, the Lord Ordinary, on the 24th December 1836, pronounced the following interlocutor:—"Repels the dilatory defences, "and decerns, but without prejudice as to any question "which may arise respecting the amount of the heritage "claimed by the pursuer, which is hereby reserved to "be discussed with the defences on the merits or otherwise hereafter: Finds the defenders liable in expenses; "appoints an account thereof to be given in, and, when "lodged, remits the same to the auditor, to tax and "report.

"*Note.*—It is stated by the defenders that there is no "heritage, except a house in Albany Street, Edinburgh, "and that this is not so valuable as the annuity of 10*l.* "which the death-bed deed gives the pursuer, though "he be about fifty years old. The Lord Ordinary "wished this matter of fact to be fixed before deciding "any thing else, but both parties were averse to this, "and therefore, as its determination is not necessary "for the disposal of the dilatory defences, it, or any "such matter, has been reserved."

Statement.

The appellants presented a reclaiming note to the Second Division of the Court, but their Lordships on the 12th May 1837 pronounced the following interlocutor:—"Adhere to the interlocutor of the Lord "Ordinary submitted to review; refuse the desire of "the reclaiming note, and decern: Find additional "expenses due; allow an account thereof to be given "in, and remit the same, when lodged, to the auditor, to "tax and report." The report of the auditor having been brought before the Court, their Lordships, having heard objections by the appellants, on the 31st May 1837, "approve of the account, and decern for payment "to the pursuer of 191*l.* 0*s.* 8*d.* of taxed expenses, with "three guineas as the expense of discussing the objec-"tions and the expense of extract, and allow the decree "to go out and be extracted ad interim."

Judgment of Court, 12th May 1837.

The respondent afterwards applied to the Court of Session for interim execution under the stat. 48 Geo. 3. c. 151., and their Lordships, on the 7th July 1837, "granted warrant for immediate execution, so as to "enforce payment to the petitioner of 191*l.* 0*s.* 8*d.* of "his taxed expenses of process, he finding caution for "the repetition of the same, with interest thereon, in

Judgment of Court, 7th July 1837.

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"case of a reversal of the judgment of this Court by "the House of Lords, and decern."

Caution having been presented and approved, the decree extracted, and letters of horning raised thereon, a charge to pay was given to the appellants, who thereupon presented a bill of suspension, on considering which the Lord Ordinary on the bills (Lord Fullerton) pronounced the following interlocutor, on the 15th September 1837:—"Refuses the bill: Finds the sus-"penders liable in expenses; allows an account to be "given in, and remits the same, when given in, to the "auditor, to tax and report.

"*Note.*—The words of the statute are conclusive "against the suspenders. The judgment in the case "of Lady Haddington, 20th November 1811[1], is exactly "in point. The Court were not called upon to find "any thing as to the absolute incompetency of the "appeal, though that opinion is ascribed to them in "the report; but the judgment, allowing the extract "to be issued, clearly and necessarily implied their "opinion on the point, which certainly was within "their cognizance, and warranted by the terms of the "statute, viz., that it was not competent by appeal to "stay the execution of their former order. Considering "the terms of the judgment and order for interim "execution here, and the admission of the bond of "caution by the proper officer, the other reasons of "suspension are obviously inadmissible."

The defenders presented a second bill of suspension to the succeeding Lord Ordinary (Lord Meadowbank), when his Lordship pronounced the following inter-

[1] Fac. Coll.

locutor:—"29th September 1837.—The Lord Ordinary "having considered this bill, with the former bill and "answers, and writs produced, refuses the bill."

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Against these interlocutors the defenders presented a reclaiming note to the Second Division of the Court, upon advising which their Lordships, on the 5th December 1837, pronounced the following interlocutor:—

Judgment of Court, 5th Dec. 1837.

"The Lords having considered this reclaiming note, "with the minute and answers and other proceedings, "refuse the desire of the note; adhere to the inter-"locutor reclaimed against; find additional expenses "due; remit to the Lord Ordinary on the bills to "proceed accordingly."

The appellant brought three separate appeals against the proceedings above detailed, which came on to be heard at the same time. The first against the judgment adhering to the Lord Ordinary's interlocutor, which repelled the dilatory defences as above mentioned and the previous interlocutory judgments in reference thereto, and embracing also certain judgments pronounced as to the respondent's admission to the poor roll; the second against the judgment awarding interim execution; the third against the judgment adhering to the Lord Ordinary's judgment refusing the second bill of suspension.

Appellants Argument.

Appellants.—The settlement by Mr. Clyne in 1815 constituted a complete and absolute mortis causâ disposition of his whole means and estate; the terms used reach a great deal farther than a mere disposition to his parents in the event of his predeceasing them. The condition annexed to the deed relates exclusively to the disposition to the parents; his predeceasing his parents was the only contingency upon which it was

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possible they could succeed to his means and estate. The deeds of Mr. Clyne and his parents must be taken together, and when so taken they evidently provide as well for the survivance as the predecease of Mr. Clyne.

The deed by Mr. Clyne constituted an effectual feudal conveyance, and might have been rendered effectual by an express nomination under it. Mr. Clyne's parents were the parties first named, on whose failure the destination to parties unnamed was to take effect. An entail to A. B., whom failing to a series of heirs to be named, is a good entail, though A. B. should never take. Mr. Clyne expressly reserved power, in his deed of 1815, of naming the party who was to take after his parents, and that on death-bed. A deed not effectual as a conveyance may be sustained as a nomination, for the greater includes the less. Either the destination by Mr. Clyne to trustees to be nominated by himself was effectuated by the deed attempted to be reduced, or the nomination by his parents was equivalent to a nomination by himself. Mr. Clyne indicated his intention to exclude the respondent in a deed not challengeable as on death-bed, and having done so the respondent cannot object to his merely effectuating that previously declared intention. There is no essential distinction between a conveyance to trustees for purposes to be declared and a conveyance to parties to be named, because in the one case as much as in the other it requires the execution of another deed to exclude the heir. The heir will take in both cases, except for the execution of a subsequent deed.

The deed attempted to be reduced cannot operate as a revocation of the former deed. The revocation is not absolute. There is no evidence of intention to

revoke irrespective of the death-bed deed. These deeds are not inconsistent with each other; the trustees are different, but the objects of trust are nearly identical.[1]

(Second appeal.) The application for interim executions was irregularly made: 1. Because no copy of the petition of appeal was presented to the judges at the time the warrant was granted in terms of 48 Geo. 3. c. 151. s. 17. 2. Because the dues of Court were not paid. The respondent's privilege as a pauper ceased on his obtaining decree. 3. Because the powers given to the Court pending appeal are limited to the case where money has actually been expended in costs by or for behoof of the party, 48 Geo. 3. c. 151. s. 17. 4. The agent, being the party to receive the costs, is himself the cautioner for their repayment.[2]

(Third appeal.) An order of service of an appeal by the House of Lords, and service following thereon, necessarily stops all procedure on the decree of the inferior Court until the appeal be decided. It has never been disputed that from the time at which the Court of last resort entertains and resolves to decide on an appeal, the case is altogether removed out of the jurisdiction of the Court below; that it remains in dependence before the higher tribunal; and that all

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[1] Colquhoun v. Colquhoun, 8th July 1831; Brack v. Hogg, 23d Nov. 1827, 6 S. & D. 113; Coutts v. Crawford, (12th June 1795,) as reversed, 2 Bligh, 655; Mure v. Rae Mure, 15 D., B., & M., 581; Rowand v. Walker, 15 D., B., & M., 563; Kerr v. Vaughan, 24th Feb. 1829, 9 S. & D. 454; Fordyce v. Cockburn, 5th July 1827, 5 S. & D. 897; Willoch v. Auchterlony, 14th Dec. 1769, Mor. 5539; Pennicuick, 18th Jan. 1687, Mor. 3243; Cuninghame, 10th June 1748, Elch. Death-bed, No. 19. affirmed; Anderson v. Fleming, 17th May 1833, 11 S. & D. 612.

Beveridge's Forms of Process, vol. ii. p. 640; Juridical Styles, 2d ed., vol. iii. t. 5. § 4. p. 881-2.

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diligence, execution, or action must remain in the state in which they are at the time when the respondent is made a party to the appeal, until the cause is decided.

It has been already decided by this House that the statute 48 Geo. 3. c. 151. s. 17. does not deprive the party of his remedy by appeal against a decree for interim execution. In the case of Milne against Imlay, 25th January 1822 [1], the judgment of the Court of Session having been appealed from to the House of Lords, and interim execution awarded to the successful party, Imlay appealed against the interlocutor awarding it. Milne presented a petition to the House of Lords, praying that the appeal might be dismissed as incompetent; but the House of Lords adjudged, "that "the said appeal is competent," and ordered that "the "prayer of the said petition be not complied with." A similar decision was given by the Committee of the House of Lords in the case of Clyne against Sclater, 7th August 1833 [2], in which the competency of an appeal against interim execution was sustained. There is no case to be found on the records of this House in which the competency of such an appeal in the abstract has ever been decided in the negative.

Respondent's Argument.

Respondent.—The appeal is incompetent in respect that the judgments appealed from are interlocutory merely, and no leave to appeal has been asked or obtained from the Court below in terms of 48 Geo. 3. c. 151. s. 15., and 6 Geo. 4. c. 120. s. 5.

The doctrine contended for by the appellants, if given effect to, would go entirely to subvert the law of

[1] Milne v. Imlay, 25th Jan. 1822, 1 S. & B. 268.
Clyne v. Sclater, 15 S. & D. 1008.

death-bed, inasmuch as it would enable a person in lecto to nominate disponees to take his property, although he had not excluded the heir from taking by a deed executed in liege poustie.

The condition of Mr. Clyne's predecease in the deed of 1815 applies to the nominees of Mr. Clyne as well as to the other substitutes in the deed; and that condition never having been purified, it is plain that even an express deed of nomination by Mr. Clyne, executed in liege poustie, would have been totally inoperative.

The deed by Mr. Clyne's parents had reference only to their own property, and could not possibly operate as a nomination of disponees to the property of their son. If it could be assumed that it did so operate, then it would clearly have been revoked by the death-bed deed. But in fact both of the deeds of 1815 were absolutely non-existent at the time when the death-bed settlement was executed. Whether these deeds are considered as separate and independent settlements, or as linked together in the manner contended for by the appellants, still the effect is the same, —they were not legally in existence at the time referred to. The deed of the son had lapsed from the non-occurrence of the event in which alone, whether as a separate or a conjunctive deed, it was to operate, namely, his predeceasing; and the deed of the parents had operated by carrying their property to the son, and had thereby become exhausted.

Mr. Clyne's intentions can only be collected from the deeds which he executed. If Mr. Clyne intended to exclude his heir, quod voluit non fecit.

(Second Appeal.) It has been expressly provided by the statute 48 Geo. 3. c. 151. s. 17., which regulates this

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matter, that it shall not be competent to appeal against an order of the Court below allowing interim execution pending appeal.

The obvious meaning of that clause is, that the matter of interim execution shall be left in the discretion of the Court of Session, that an appeal against any such order is incompetent, but that the House of Lords will consider and regulate that matter, on hearing the appeal against the principal judgment in the cause.

In the case of the Countess of Haddington v. Stein, 20th November 1811 [1], the Court, pending an appeal against their decision in a suspension of a charge on a bill, granted warrant for interim execution, in favour of the charger. An appeal against this warrant was presented, and an order of service obtained and intimated; but it does not appear that the statutory incompetency of this appeal was brought under the notice of the House of Lords. The clerks in the Court below having had some difficulty in extracting the warrant in the face of the appeal, the charger applied to the Court to ordain them to give extract, and "the Court were of opinion that the second appeal "was incompetent, and ordained the clerks to issue "the extract."

Although it may be true that a copy of the petition of appeal was not presented to each of the judges, yet it cannot be denied that a copy of the petition of appeal, duly certified by the clerk of parliament, was produced in process, and laid before the Court along with the petition for interim execution; and this is precisely in terms of the statute 48 Geo. 3. c. 151. s. 17.

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[1] Fac. Coll.

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Respondent's Argument.

A party on the poor's roll must be held entitled to the statutory benefit of interim execution, unless he has been expressly excluded from that benefit by the terms of the statute itself. The statute makes no such exclusion, but, on the contrary, provides the benefit to all parties, whatever their circumstances may be, who are in possession of a decree of the Inferior Court for expenses.

(Third Appeal.) It is quite unquestionable, under the provision of the statute 48 Geo. 3. c. 151. s. 17. already referred to, that an appeal against interim execution does not stop execution in the Court below.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, in this case of Gordon v. Clyne your Lordships have lately heard three appeals; the subject matter of the contest between the parties being, according to the case made by the defender, property of less value than a life income which the pursuer is entitled to under the deed in question. It is true, that on the part of the pursuer it was stated that the property was of much larger value, but the defender, the present appellant, contends, that the property is of less value.

The first appeal, (which is that which raises the question,) was objected to upon the ground of incompetency, inasmuch as it was alleged that the adjudication was upon a mere preliminary defence, and not touching the merits.

The facts, so far as it is necessary to consider that part of the case, are these:—The pursuer (respondent), seeking to reduce a deed upon the ground of death-bed, is met by an allegation that there was another deed, a valid deed, which, if the latter deed were impeachable, would be a

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bar to his claim,—namely, a deed of 1815, which it is alleged would equally preclude him from claiming the heritage; so that under those circumstances he would have no interest in impeaching the deed challenged upon the ground of death-bed. This was made the subject of preliminary pleas. The Lord Ordinary decided (which was afterwards affirmed by the Inner House), that that ought not to be treated as a preliminary defence, inasmuch as it went to the whole merits of the case, there being no doubt that the latter deed, the deed to be challenged, was a deed executed so recently before the death of the party as to be void, provided the heir was in a situation to be at liberty to challenge it. The whole case, therefore, turning upon the right of the pursuer, the heir, to challenge and reduce that death-bed deed, it was obvious that that embraced the whole matter in contest between the parties; and therefore the Court was of opinion that they ought not to treat it as a preliminary objection, but that it should be considered as constituting the whole substance and merits of the case. Upon this the defender put in pleas in law to the whole case, and repeated the objections which he had before made as preliminary objections.

Now, my Lords, the four pleas were these:—"First, "The pursuer is barred from challenging the deed "libelled on, in consequence of the settlements exe- "cuted by Mr. Clyne and his parents in 1815. These "settlements were not absolutely revoked by the deed "under reduction, but only in so far as they interfered "with the last deed; so that if this settlement could be "reduced by the pursuer the former settlements would "revive." "Second, The pursuer has no real or

"legitimate interest to challenge the deed libelled "on, as his interest is much greater under the last "settlement than it would be under the former deeds, "which would necessarily regulate Mr. Clyne's suc- "cession, if the settlement now under reduction "were reduced." Upon that second ground no judgment has been pronounced, but the inquiry as to the facts is reserved for further consideration. Third, "The deed under reduction having been executed "agreeably to reserved powers in the settlements of "1815, and as appears from its narrative being in- "tended to effect certain alterations on these deeds, "and the said deeds being all linked together, the "defenders have in their persons a sufficient title to "exclude the challenge here brought forward on the "part of the pursuer." Fourth, "The pleas of the "pursuer, being groundless both in law and in fact, "ought to be repelled, and the action dismissed."

The result, therefore, is, that upon these four pleas judgment has been given against the defender on the first and third. The second has been reserved for further investigation; and upon the fourth, which is merely raising a question upon the validity of the case set up by the plaintiff, no judgment has taken place. It is therefore undoubtedly an adjudication upon the merits, though an adjudication not exhausting the whole; that is to say, it is an adjudication upon part of the case, which in all probability will leave little or nothing to be hereafter adjudicated upon; but still it is an adjudication upon the merits of the whole case, the whole case being discussed by both parties.

Upon this state of the proceedings two questions were decided by the Court below. Two questions, there-

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fore, are raised for your Lordships consideration; the first being, whether the deed of 1815, and the subsequent deed executed by the parents of the party deceased, are such as to bar the heir, provided the death-bed deed did not stand in his way; or, in other words, whether, supposing the death-bed deed never had been executed, the title of the heir would have been excluded by these transactions of 1815. The second question raised is, whether the deeds of 1815 may be coupled with the death-bed deed, so as to exempt it from the operation of the law respecting death-bed.

My Lords, it appears that the party deceased having certain property of his own, and his father and mother having certain property belonging to them, that this arrangement took place: the first deed which was executed was the deed of August 1815, by which David Clyne, the party deceased, disposed of his property in these terms:—"In the event of my predeceasing my "parents without leaving lawful heirs of my own body, "I do hereby give, grant, assign, dispose, convey, and "make over to and in favour of William Clyne, mer- "chant in Thurso, my father, and Margaret Swanson "his spouse, my mother, during their mutual lives, "and to the longest liver of them two, and after "the death of the longest liver to and in favour of any "person or persons, or for such uses, ends, and pur- "poses as I may name and appoint by any deed I may "execute at any time of my life, and even on death- "bed, and in case of my dying without having executed "such deed, then to and in favour of such person or "persons as shall be named and appointed in any deed "that shall be executed (according to law or agreement

"among themselves in such deed) by my said parents." The fact which happened was, that the parents predeceased this David Clyne.

In the month of September in the same year a deed of disposition and settlement was executed by the father and mother; and they, although it is stated that they *had* no heritage, use terms which, if they had any, would have operated as a disposition in favour of David Clyne their son, and the heirs of his body; whom failing, in favour of other persons. The terms used are,—"property which shall belong to us, or either "of us, at the time of our death." That provides, therefore, for such property as they might have at a future time; and if the son had died before the parents, and the parents had become possessed of the property, which in that event was destined to them by his deed of August 1815, their deed might have operated upon property so passed to them; but the facts are, that the father and mother died before the son, the consequence of which may be, that the deed of 1815 failed to have any operation at all, being entirely conditional, namely, made in the event of his predeceasing his parents; that, however, is a matter of contest at the bar. But one point cannot be a matter of contest, namely, that the estate to be acquired by the parents was conditional upon their surviving their son, and that by the death of the parents before the son that disposition in their favour fails; and another point will be equally clear, that the power intended to be given to the parents over the estate was also conditional, and could only operate in the event of their being possessed of that estate, which they were to have only in the event of their surviving their son.

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The first point, therefore, contended for, namely, that these two instruments operated, in the event that happened, to disinherit the heir, and that the heir therefore would have no title even if the death-bed deed had had no existence at all, I apprehend wholly fails; and therefore that impediment is removed out of the way of the heir, and he therefore stands in the situation of being a party interested in disputing the validity of the death-bed deed, the prior deeds not being of a nature to deprive him of the right of heirship.

My Lords, then it is said that that being so, although the second deed, namely, the disposition by the parents, cannot be considered as operating upon this property so as to remove the title of the heir; still the deed of August 1815 is a disposition of the heritage, and as such is not open to the objections that are made by law to death-bed deeds. That was the ground principally contended for by the appellant. That argument is founded upon this supposed state of the law, namely, that a party, although he cannot dispose of his estate within sixty days of his death, may execute a deed beyond the limited time, and that then he may, by a deed within sixty days, do that which would perfect that instrument; and in the course of that argument cases were cited to show, that by the law of Scotland, if the whole heritage,—the feudal title, is disposed of by a deed not objectionable upon the ground of death-bed, the trusts may be declared by a deed within the period, or by a will executed in England and according to English forms.

My Lords, I apprehend that those cases have no reference to the present, because in those cases the whole feudal title was complete by the original deed;

and it is very similar to the law existing in this country, namely, that a will disposing of real estate must be executed and attested in a certain form; that being done, and it being part of the provision of such a deed, that the estate shall be subject to the payment of legacies to be afterwards bequeathed, a legacy given by an instrument not properly attested is valid, and will operate upon the property devised, because it is devised by a properly executed and attested instrument. So in this case, provided the heritage be legally divested, and is passed by a deed executed within a period sufficiently long before the death of the party as not to be objectionable on the ground of death-bed, the party may declare the trusts of it by an instrument not executed according to the forms which the law of Scotland requires in passing heritage.

One case, and one case only, was referred to, which seemed to open any argument upon the ground contended for, and that was the case of Fordyce.[1] Now the case of Fordyce was this: A party, by a deed not objectionable upon the ground of death-bed, had conveyed his estate to trustees, of whom a Mr. Cockburn was the survivor; afterwards a will was made, professing to give the estate to the same Mr. Cockburn and another trustee. That other trustee predeceased Mr. Cockburn, so that at that time Mr. Cockburn was the surviving trustee named in the will; and it was contended at the bar, that, being the trustee named in the will, he had asserted a title to the estate in that character, and that title was recognized; but, upon examination, it turns out that Mr. Cockburn's title was as trustee named in

[1] 5th July 1827, 5 S. & D. 897.

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the deed; he had a title entirely independent of the will, which was invalid as a conveyance of heritage upon the ground of death-bed.

My Lords, a case was referred to, namely, that of Crawfurd v. Coutts, 2 Bligh, p. 688, where Lord Eldon, (in discussing the question whether a death-bed deed revoking a former settlement, and professing to dispose of the property, can be bad as to the disposition, but good as to the revocation, so as to let in the heir,) puts this case, which I think your Lordships will see is identical with the present: He says, "In Scotland no "man can make a valid liege poustie deed in this form: "'Know all men by these presents, that I do hereby "reserve a power to dispose of my estate at any time of "my life, et etiam in articulo mortis.' The liege poustie "deed must be some actual deed of disposition existing "at the death of the grantor." My Lords, the argument here is, that the party has said precisely what Lord Eldon supposed a party to say, namely, by the language of the deed of August 1815, "I hereby "dispone of my estate to such persons as I may "hereafter name." No disponee being named you must look, therefore, to the death-bed deed for the disponee. It is, therefore, neither more nor less than what Lord Eldon supposes the party to say: "I hereby "reserve a power to dispose of my estate at any time "of my life, et etiam in articulo mortis." There is no instrument existing anterior to that death-bed deed which disposes of the heritage; there can be no disposition of the heritage without a disponee. There is no existing instrument which can take the title from the heir, unless you have recourse to the death-bed deed, which is now challenged.

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My Lords, if, therefore, the case and the arguments raised at your Lordships bar rested upon those two deeds alone, I should have no hesitation in advising your Lordships that the judgment of the Court below should be affirmed; but there is another ground alluded to in the short note[1] which we have of the opinions of the Learned Judges below, and I cannot, therefore, entirely pass that over. According to the argument contended for by the defenders the effect of the deed of August 1815 would be this,—to reserve to himself the power on his death-bed of naming the disponee. To carry that intention into effect one would expect to find a deed performing that service, either referring or not referring to the prior deed (it is not absolutely necessary to refer to it), and naming the disponee to take under the prior disposition. Instead of that we have a deed in which the party states that it is necessary to make alterations in his settlement; and he proceeds actually to dispose of and convey his estate, without reference to any power reserved to him, and not only without reference, which would not be necessary, but the deed actually revokes the former deed so far as that is inconsistent with the present: in fact that deed is absolutely and entirely inconsistent with the death-bed deed. According to the argument he would have nothing to do but to name the disponee; instead of which he conveys and disposes de novo, and recals the former deed so far as that is inconsistent with the latter deed.

My Lords, it was said, when I suggested that to the learned counsel at the bar, that that objection ought to be taken with a good deal of caution, because it had

[1] 15 D., B., & M., 915.

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not occurred to any of the parties below. I was rather anxious to find out how that matter stood, and upon looking through the papers I find that it was alluded to below. I find this in the 11th page of the appellants case:—"It may be objected to this argument, "that Mr. Clyne intended to make a new deed, not to "exercise a faculty reserved in a former one. The "defenders would reply, in the first place, that it was "decided, in the case of Willoch v. Auchterlony, that "such a faculty may be exercised without a special "reference to it. But farther, the greater includes "the less. It was meant both for a disposition and a "nomination. It may stand for a nomination, just as it "will stand as a testament, although as a disposition "it should be reducible, and, as the deed of 1815 is "declared to be revoked only so far as inconsistent "with that of 1833," &c. That very point is raised; and when the Learned Judges below are found expressing an opinion that the deed of August 1815 was absolutely revoked, they were perfectly warranted in that opinion.

My Lords, this, in my view of the case, would exhaust the first appeal, with one exception, to which I am about to call your Lordships attention. It would also dispose of the matter as far as relates to the merits. But I cannot but observe that this appeal also includes a great variety of interlocutors; I believe there are not less than twenty called in question by these appeals. Three interlocutors are appealed from which relate to the pursuer being upon the poor's roll. The counsel at your Lordships bar have had sense and discretion enough not to advert to that point at all; I cannot but

[1] Morr. 5539.

observe that they are not properly brought as matter of appeal to your Lordships bar.

My Lords, the second and third appeals are open to very much the same observations, the Court below having decided in favour of the pursuer, to the extent to which their decision goes, under the authority of an act of parliament which directed that there should be a payment of the expenses decreed, notwithstanding an appeal. My Lords, that was made a matter of appeal, and the appeal was attempted to be supported on the grounds, first of all, that there was no printed copy of the appeal appended to the proceedings below.

Now, there was a copy of the appeal; that is not in dispute; and the whole argument is, whether there should be a printed copy, there being nothing in the act of parliament requiring that a copy should be printed. The party being poor and suing in formâ pauperis every unnecessary expense was very properly avoided; and the Judges were informed of the appeal, as the act of parliament requires, by having a copy of the appeal presented to them, but the party did not think proper to incur the expense of printing it, and that is made a subject of appeal to your Lordships House.

There is another ground, and one only, I understand, upon which that appeal is attempted to be supported; namely, that the order is for payment of costs incurred. They say that the party was suing in formâ pauperis, and he could therefore have no costs incurred; just as if any party, whether suing in formâ pauperis or not, could prosecute any appeal without incurring some expense. It was endeavoured to draw into discussion the amount of some of the charges in the bill of costs; the learned counsel's attention was drawn to that, and

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he said that he could not raise at your Lordships bar any argument upon that subject. The question, then, is, whether your Lordships are to take for granted that which every body knows not to be the fact, that a party can sue in formâ pauperis, or prosecute a proceeding in a court of law, without incurring some costs. The costs incurred are all which the Court of Session has ordered to be paid.

The question as to directing interim execution or withholding it is entirely left to the discretion of the Court; they are to have the whole case brought before them, and they are to have liberty, if they think proper, to direct interim execution.

My Lords, the Court having decided against the case made by the defenders to withhold this interim execution, they were not satisfied with that decision, and appealed to your Lordships House. They then brought two bills of suspension; the first, the Lord Ordinary decided against,—that was abandoned; and then they brought another, which was brought into the Inner House. The ground of suspension was this: that having appealed against the order of interim execution, it was not competent for the parties to proceed any further; that is to say, that the act of parliament giving the Court a power at their discretion to award interim execution, and the party being dissatisfied with that order, and appealing against it, that second appeal acted as an estoppel. If that had been so it would obviously have had the effect of destroying the discretionary power granted to the Court; but the act of parliament very wisely guarded against that, and by the 18th section it provides, that no appeal against such an interim order shall stay process: the provisions of the

act of parliament very clearly state that. The 18th section, however, was not enough to satisfy the defenders, for they not only brought these two bills of suspension in the Court below upon that ground alone, but they make the decision of the Court against them on that subject a ground of appeal to your Lordships bar.

My Lords, these two last appeals were for a long time undefended; the party did not appear; and no doubt the appellants would have been in a situation to have had the case heard ex parte,—certainly without any probability of success; and it may have been upon the certainty that the respondent, namely, the pursuer, felt that this House never would assent to the proposition of the appellants, that he abstained from appearing to defend those two appeals. In point of fact, he never did appear till the case was actually called on at your Lordships bar; then the pursuer, the respondent, did appear, and having printed his cases asked leave to present those cases. Your Lordships finding that he was actually there, and that no delay was asked, thought it more advisable to give him the opportunity of appearing than to hear the case ex parte,—your Lordships at that time not knowing the nature of the case, which if your Lordships had, you would not probably have thought it necessary that any party should appear to resist those appeals. Now the question is, whether, as those appeals, if the respondent had appeared regularly, would unquestionably, I apprehend, have been dismissed with costs,—whether under those circumstances it is proper that your Lordships should dismiss these appeals with costs. Upon the merits they ought no doubt to be dismissed with costs; but the only ground upon which your Lordships would pause before giving an

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opinion upon that subject would be this, that if the respondent had appeared, perhaps the appellants might have withdrawn their appeal, and not have come to your Lordships bar at all. Upon these grounds I am inclined to think, that your Lordships having extended to the respondent the indulgence to which he had no claim, of being permitted to come in at the last moment, it would be perhaps imposing too heavy a liability upon the appellants, to dismiss the appeals with costs. Upon the original appeal I apprehend your Lordships will entertain no doubt that it ought to be dismissed with costs.

Ld. Brougham's Speech.

LORD BROUGHAM.—My Lords, having attended the greater part of the hearing of this case, though not the whole, and a small part only of the hearing of the two later cases, upon which my noble and learned friend has pronounced his opinion so clearly and distinctly, and in a manner so satisfactory, I may dispense with the necessity of entering at greater length into the particulars of the case than is sufficient for the purpose of stating my own opinion, and the grounds upon which I have arrived at that opinion.

The importance of questions relating to the law of death-bed, whether to the application of the law in particular cases, or to the nature and constitution of the law itself, is manifest, and it is considerable. It is a peculiarity in Scottish jurisprudence, and it is a peculiarity which appears to me most useful and honourable to that system of jurisprudence that distinguishes it from ours and from all others. Our law throws a protection round the death-bed of parties, by requiring certain solemnities to be observed before they can pass real estate,—formerly their real estate only,—now, by

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the late act of parliament, their personal estate also. We all know,—those who have practised in Courts, whether of equity, or of law, or of both (which has been my lot), —all well know, how very ineffectual those conditions imposed upon parties in order to their validly conveying their estates oftentimes prove. For as it is not difficult to obtain the assistance of three witnesses, the number formerly required, or of two witnesses, the number now required, as a conspiracy may very easily be effected,—and I am sorry to say that there are constant instances of it in practice, no character whatever being required to belong to those witnesses except that they should be witnesses of credit, that is to say, that they should not be disqualified by a sentence of an infamous nature from being witnesses,—so it becomes no very hard matter to obtain a will passing large estates, whether real or personal, from a man or a woman in such circumstances, at the close of life, as shall leave the gravest suspicion upon the minds of those who have to deal with and to give effect to that instrument, whether they were in a condition or not to dispose of any part of that property. A much more effectual protection is thrown round that period of human life, a much better security is afforded to the rights of the heir at law, by the Scottish system, which requires, by a most rational and sensible arrangement, that a certain time should elapse, namely sixty days, between the execution of the instrument and the decease of the party, otherwise it shall be void and have no effect. Unless the fact be such as to make presumption yield to it,—the incapacity presumed by the law inures for sixty days. The rule laid down is, that the only fact to which the presumption of incapacity

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shall yield is the appearing at kirk or market unsupported during those sixty days; that being taken as the test of liege poustie, or that state of mental capacity which gives the party the power of lawfully and validly disposing of his heritable property. This rule is confined to heritage in Scotland, the old law there, as here, taking no cognizance of personal property, which was then of such trifling amount in the transactions of men as not to be deemed worthy of consideration by the legislature.

Such being the general law, in construing any particular matter with a view to ascertain whether it comes within it or not, we are to keep the purpose and intention of the law constantly and steadily in view, in order to see whether or not the law applies in the manner asserted. Now, it is a law for the protection of the heir at law; hence the first conclusion is, that nobody but the heir at law has a right to avail himself of it to reduce ex capite lecti. Hence a second proposition follows,—that if the heir at law has been already validly excluded, cadit questio, there is an end of the reductio ex capite lecti; he has no interest and therefore no locus standi. But if the deed set up is of such a nature as that it does not exclude the heir, then the law of death-bed applies. Hence a third proposition of necessity follows,—that no man can make, while in liege poustie, such a deed as shall exclude the heir generally, by merely indicating an intention on his part to work an exclusion of the heir. The exclusion must not only be intended by the maker of the deed, but it must be executed; the heir at law must be effectually excluded; and the intention to exclude him is good for nothing unless the exclusion is operated and effected against him. Hence it is perfectly clear,—I can hardly say as a

fourth proposition, for it follows as a parcel of the last which I have stated, as is laid down by Lord Eldon in Crawfurd v. Coutts, which was referred to by my noble and learned friend,—that a man cannot say in liege poustie, "Know all men by these presents, that I "intend that the law of death-bed shall not apply to "any disposition which I may make within sixty days;" —for what would that amount to? It would amount to this, that instead of saying "Be it therefore enacted "by his Majesty, with the advice and consent of the "lords spiritual and temporal, and commons, in par- "liament assembled, that the law of death-bed shall "be repealed generally," it would be saying, "Know "all men by these presents that I repeal the law of "death-bed in my particular case." Now no man can do that; he must conform himself to the law. But it also follows as another proposition, which I take to be quite clear, that no man can work the disinherison of the heir, and exclude the application of the general law of death-bed, by merely saying, "I disin- "herit the heir;" he must disinherit him by conveying the estate out of him, and conveying it to somebody else. Hence it is another, and it is the last proposition bearing upon this question with which I shall trouble your Lordships, viz., that it is clear that no man can make a deed in liege poustie which is blank in the name of the disponee,—I hold that to be quite clear,—that no man can say, "I disinherit the heir in favour of "blank," and then within sixty days fill up that blank: I take that to be clear.

But, my Lords, I must add, that it is not at all necessary for the disposing of the present case that I should affirm or prove the latter of these propositions;

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it is otherwise with respect to powers reserved. If in liege poustie you create a valid power, you may reserve the moment of the execution of that power till within sixty days, just as my noble and learned friend has most properly stated; and moreover I may add this,—you may constitute a trust, and if you, by the constitution of that trust, take out of the heir his succession in liege poustie, you may operate upon the trust so created within sixty days, and it cannot be reduced as ex capite lecti. But why? Because you have validly effected your purpose. You not only have moulded it so as to shew entirely in what way your bounty is to be distributed, but you have entirely defeated the right of the heir by vesting the estate in trustees. You may afterwards declare a cestui que trust, or at all events you may declare the various burdens and legacies connected with it, and the other matters which unite themselves with the disposition of the property: So in England the protection of requiring three witnesses signing in the presence of the testator (now reduced to the number of two by the late law[1]) is analogous to the protection afforded by the law of death-bed in Scotland to the dying moments of a sick person. If I, by will, executed by three witnesses in my presence, or now, by the late change in the law, by two,—if I validly constitute a trust in favour of A. and B., and afterwards, without the three witnesses or the two witnesses, make any legacy connected with it, that will hold without the presence of two witnesses, as the law at present is, or three as the law formerly was; for the instrument which executes the entire purpose of disposing of the

[1] 7 W. 4. and 1 Vict. c. 26.

property being a complete disposition of the property, and that being attested now by two and formerly by three witnesses, that is sufficient,—but without that it would not be sufficient. Now, such is the general principle upon which I take this law to be established, and in support of which I would only refer to a very learned and accurate note (for I have looked into the original book) by Mr. Ivory in his edition of Erskine's Institutes[1], which states it pretty nearly in the same manner:—"Under a trust disposition of heritable "property, with reserved power to regulate the admi- "nistration of the trustees and the application of the "trust estate by a testamentary deed"—(now he clearly means here testamentary, as contradistinguished from liege poustie, that is to say, a deed within the sixty days,)—"by a testamentary deed containing a "special declaration of uses and purposes, or directing "the payment of legacies, donations, &c., such a "testament, if executed in liege poustie, will effectually "exclude all challenge by the heir, notwithstanding "the trust deed was an undelivered document." But he goes on to say, "And where the trust conveyance "so disposes of the primary interest in the estate"—(what he means by the primary interest is what we should call the legal estate)—"as by its own force, "in default of exercise of the reserved power, to "exclude the heir at law, the reserved power may "be exercised even on death-bed." Why? Because the primary interest, the legal estate, has been validly taken out of the heir at law by the first deed, the valid deed in liege poustie, and consequently the

[1] Ersk. (Ivory's Ed.) b. 3. tit. 8. sect. 98. n. 549.

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intention operates, and the deed made in liege poustie will validate and give effect to the death-bed deed.

Now, my Lords, such being the principles upon which this law is framed, and upon which it is to be applied casibus omnibus, I have now simply to state to your Lordships my opinion upon the present case, by referring to the very distinct statement of my noble and learned friend of the facts of the case, where those facts are totally undisputed. Upon one point your Lordships may observe there is a difference, namely, whether the construction of this deed, taking it altogether, is such as to make it founded upon the event of predecease. But upon the other point, the more essential point of the two, there is no dispute, nor can there be any dispute; I allude to the two deeds, the one of August and the other of September in the year 1815, and which are both of them liege poustie deeds: "I, David Clyne, solicitor in the "Supreme Courts of Scotland, in the event of my "predeceasing my parents without leaving lawful heirs "of my own body, do hereby give," and so forth; and then he adds a disposition to his father and mother during their joint lives, and to the longer liver, "and after the death of the longer liver to "and in favour of any person or persons, or for "such uses, ends, and purposes, as I may name and "appoint by any deed I may execute at any time "of my life, and even on death-bed; and in case "of my dying without having executed such deed, "then to and in favour of such person or persons "as shall be named and appointed in any deed that "shall be executed (according to law or agreement "between themselves in such deed) by my said parents."

Now, this I take to be perfectly undeniable, that two events must concur, two facts must happen. I know that taking it altogether a dispute has been raised upon this, but I hold it to be quite clear that two facts must concur, that two events must happen, before this deed can have any operation at all. What are these two events? That the son, the maker of the deed, shall predecease his parents, and that he shall predecease his parents without issue. Then a third event must be added to these two before the operation of the September deed can take place, that is to say, before there shall be any thing upon which that deed, whatever it is, can operate,—before that can exist,—before that can come in use as a subject matter for the parents deed to work upon. What is that third event? His predeceasing is the first; his predeceasing without leaving a lawful heir of his own body is the second; his dying without executing any deed himself is the third. These three events must all concur: his predecease,—his predecease without issue,—his predecease without issue and without any appointment, without executing any deed himself. All these must concur before the parents can have any one thing upon which their deed operates.

Now, my Lords, in the year 1828 the father dies; in 1829 the mother dies; in 1833 the maker of the deed dies; consequently there is an end of the first material event—the corner stone of the whole of this conveyance,—it all falls to the ground,—for instead of predeceasing them he survived them both. It is not material whether he executed any disposition or not; it is immaterial whether he died without heirs; the predecease never happened.

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Now, it has been contended, that the first condition did not override the whole case; but has it ever been contended that it does not override the father's and mother's deed? The father and mother execute a power. Upon what to operate? Upon the estate of the son. There were other estates upon which it was to operate, independent of the estate of the son, but it could only have any thing to operate upon in the son's estate, in the event of the son's predecease; but they predecease, and therefore it has nothing to operate upon.

My Lords, these are the short grounds upon which I hold that the heir is not excluded here from suing, and upon which I also hold that the law of death-bed here plainly applies. I find that in the Court below, though we have not a very full account (as we have often to lament) here of what passed, we have a very distinct statement, a very intelligible and concise statement, of the reasons of the Learned Judge Lord Glenlee, than whom a more able and learned judge never was upon that or any other bench, in which he says, alluding to the arguments at the bar, "If it had been distinctly made out that the pursuer was barred by a "subsisting deed"—there was no subsisting deed, for there was nothing for it to operate upon,—"which would "have prevented his claim on the reduction of the "death-bed deed, the defenders might have succeeded "in their argument; but it has not been made out "that such deed was in existence at the date of the "last settlement, and therefore the pursuer is not prevented from claiming."

[1] 15 D., B., and M., 915.

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With respect to the other causes, and also to a very great deal of the oppressive litigation in this cause among the eighteen or twenty interlocutors brought before us, I entirely concur with what my noble and learned friend has stated in expressing my great disapprobation, and I will go so far as to say my reprobation, of these proceedings. The first of these appeals ought to be dismissed with costs; that no man can doubt: I only have a doubt whether the second and third ought not also to be dismissed with costs. My first impression was, that they ought. My noble and learned friend has somewhat weakened that impression, by reminding me that it is barely possible that the defenders, the present appellants, if they had seen that the respondent was going to meet them, and that these two cases were not about to be set down and heard ex parte, might have thought better of it, and might not have proceeded. It ought to be observed, however, that that does not apply to any thing but the hearing, and that is to be considered. And for the purpose of further considering it I will beg my noble and learned friend to agree with me, that before finally saying whether or not the respondent should have the costs of the second and third appeals, we should take a day or two to consider that; because if costs would have been incurred by the respondent up to the moment of coming to the bar, all that the appellants at the last moment could have done might have been not to have had the appeals heard here.

LORD CHANCELLOR.—They had not appeared.

LORD BROUGHAM.—Oh! they had not appeared to the appeal; then my observation is misplaced, undoubtedly. That does introduce a very considerable

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doubt in my mind. Then I rather agree with my noble and learned friend, that it will be difficult to give costs; but we had better take a little time to consider that. I should very much regret, and so I am sure does my noble and learned friend, if, under the circumstances of this case, we cannot call upon the appellants to pay the costs of the second and third appeals.

Now my Lords, having disposed of those cases, it is fit that I should state an impression upon my mind, connected with the name of the most learned and venerable judge whose opinion I have just cited, I mean my Lord Glenlee, who has given a very concise, but a most correct and well grounded, judgment in this case, agreeing in every respect with that which your Lordships have now affirmed, and distinctly applying itself to the principal and main ground of the present affirmance. There never was upon any bench, in any country, a more reverend, a more able, a more learned judge. He is a man thoroughly imbued with the most profound, extensive, and masterly knowledge of all the jurisprudence of his own country, and of all the general principles upon which all systems of jurisprudence are grounded. He is a man whose knowledge is not confined to the jurisprudence of Scotland, or even to law in general, but he is one of the most profound scholars in all the most difficult branches of science to which the human faculties can be applied. I know that he has passed his days and his nights in those profound, most difficult, and most sublime investigations; I know that there exists not within the bounds of this country at this moment a man so deep a mathematician (I mention it to his honour) as he has been all his life in the horæ subsecivæ of his judicial pro-

fession; I know that up to this last month, from direct communication with that learned judge, his mind is as vigorous and as entire as it was forty years ago.

My Lords, I stand here to perform an act of justice, and of strict justice only, in giving vent to these sentiments of my mind. If there be any man who knows Scotch law better than I do,—if there be any man of any age, of any amount of experience, of any extent of inquiry, in any other place, who from his own personal observation has found reason to look down upon Lord Glenlee, to raise himself above him, and hold that he, this observer, is entitled to pass sentence upon the state of the faculties of that most able, most learned, and most venerable judge,—if any such person knows science so profoundly,—if any such person is so much better versed in Scotch law than the humble individual who now deems it his duty, and his painful duty, to address your Lordships in the performance of an act of strict justice alone,—if any such person, in any other place, shall have taken upon himself the office of pronouncing sentence upon the continuance or the discontinuance of the judicial capacity of that judge,—all I can say is, to that higher authority, to the superior illumination of mind, to the greater knowledge of law, to the larger, and more full endowment of science of that individual, I shall bow with the deference which is due to it from me. But until I am otherwise instructed, and until I have lost my memory, and until my faculties are gone, so that I shall no longer know right from wrong, or a sound judgment such as this, which your Lordships are now occupied in affirming with costs, upon the same grounds upon which he gave it,—or until I know not how to read a letter written three weeks ago upon a scientific topic, or think

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the writer of that letter knew not what he was writing,— I am bound to hold by my own opinion; and it is an opinion which I have deliberately formed, and which I now without hesitation pronounce.

My Lords, an accident prevents your Lordships from having laid before you the testimony of other learned judges concurring in the same opinion. I have had correspondence, and very lately, with them too; and my noble and learned friend who immediately preceded me in the highest judicial office in this country was to have attended to-day for the express purpose of bearing his testimony, much more valuable than mine, to the continuing capacity of these learned judges to exercise the judicial office. Having accidentally not been present at the hearing of this particular cause, he did not think that he ought to come down (and I agree with him, though I lament his absence,) to take part in this interlocutory or rather accidental appendix to the judgment; but I have Lord Lyndhurst's authority for stating that his Lordship has been in recent correspondence with one or two of those learned and reverend judges, that he has been in recent correspondence with the chief of that Court, and that he gives it as his most decided and deliberate opinion, that the great faculties and enlarged mind of that illustrious person, the head of the Scottish law, are as I have described the others to be.

My Lords, it is no light matter to have such things as these fabricated, and such opinions, if I may dignify them by such a name,— things which merit no such respectable appellation, — to have such matter (to give it no more offensive name) vented, and vented in high places. Much depends upon the fancies of men,—much upon their casual impression: promulgate

the notion that the mind of the soundest man in England who is called upon to deliver judgment is gone, or is going,—I will venture to say, be it the soundest that ever inhabited the frail tenement of a human body, provided age has come upon that body, there will not be wanting people to fancy, and even very honestly to believe, that they see symptoms of failure. I have seen it over and over again in private, when I happened to know that there was not the slightest foundation for it, because the party survived years and years in the full possession of his faculties.

But, my Lords, it is no light matter to have judicial character carped at in such a way; and God forbid that I should ever live to see the day in this country when the conduct of judges should be attacked otherwise than in the manner that the laws and constitution of the realm have provided for its being attacked, namely, an address by both Houses of Parliament; that is the legal remedy,—that is the proper mode. What avails it to the independence of the bench, the most important of all the benefits which the constitution showers down upon us,—what avails it to the independence of the judicial character, that the law says that a judge shall not be removed during his life, and during his good behaviour, if he is to be flung at, if he is to be attacked, if he is to be held up to derision and contempt, more unbearable than public hatred and scorn itself, as one who has survived his intellects, and who sits upon the bench that he can no longer adorn, in order that by neglecting his judicial duties, by filling the place which an abler and

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fitter man ought to occupy, he may have a pretext for receiving the public money in consideration of a duty which he no longer has the capacity to perform? I had rather at once be impeached,—I would rather hold up an arraigned hand at your Lordships bar, where I could defend myself, and where I could appeal to your Lordships for justice, which I know I should have,—than I would submit to be the butt of such shafts, and the victim of such attacks.

My Lords, I have filled the highest judicial office in this country for a longer period of time than any man now living. Had my noble and learned predecessor, who filled it so much longer, the late Lord Eldon, been alive, I should not have been the person to deliver these sentiments before your Lordships. No man better knew than he the great faculties and extraordinary merits of those learned and reverend persons; but he is now taken from us, and the duty devolves upon me, which I have now painfully performed before your Lordships, except that no man ought ever to feel any pain while he knows that he is conscientiously discharging an important duty. It is your Lordships bounden duty, as you have now and then to reverse the judgments of the Court below,—as you have occasionally to differ from those learned judges,—(and you have always respectfully expressed that difference of opinion, and always reluctantly altered their judgments,)—so it is your bounden duty, as it is your special and your precious privilege, to defend, to sustain, to protect those learned judges when you know that they are so foully, falsely, and most unjustifiably assailed. I have received a letter from

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Lord Lyndhurst, begging that I would make known his entire coincidence of opinion with me. We have talked over the subject repeatedly.

My Lords, in the case of Gordon v. Clyne, in which there were three appeals, your Lordships have some doubt with respect to the costs of the second and third appeals. Your Lordships disapproved of the proceedings of the party in bringing those appeals; but as there had been no appearance made for the respondent until the case came on for hearing, the consequence was, that it might naturally enough be said by the appellants, non constat that we should have gone on had we known that the other party meant to defend; and consequently the delay of the respondent in making that appearance, although not blameable in him, considering the poverty of the client, who sued in formâ pauperis, nevertheless has the effect of raising a defence against costs on the part of the appellants. In order to consider whether it was possible to overcome this objection, which at first appeared almost insuperable, it was agreed that we should postpone that only point for the consideration of the House for a few days. My noble and learned friend and I have agreed upon the subject, that we do not find that we can overcome that difficulty; and therefore, however reluctant we are, and confessing our reluctance to refuse the costs, we find that we have no other course open to us. As to the costs of the first appeal there can be no doubt, and those have been already disposed of.

LORD CHANCELLOR.—My Lords, I entirely agree with the opinion of my noble and learned friend as to the order now to be made; at the same time expressing my

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regret that the parties who have brought an appeal of this description to your Lordships House should escape without payment of costs. But I think it is quite clear under the circumstances that your Lordships cannot make any other order.

First appeal.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed, with costs, to be paid to the respondent within one calendar month.

Second appeal.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed.

Third appeal.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed.

DEANS and DUNLOP — JOHN ALISON, Solicitors.

[*26th March* 1839.]

(Appeal from Court of Session, Scotland.)

WILLIAM MACKENZIE and others, Appellants.— *Knight Bruce—Dr. Lushington.* (No. 5.)

MRS. JANET ORR or GORDON, Widow, and others[1], Respondents.—*Sir William Follett—M. Smith.*

Competition. — A party lending a large sum over an estate possessed in fee simple stipulated to receive as part security, in addition to a bond and disposition in security in his favour, assignations to certain incumbrances of a prior date. The incumbrances were paid by the trustee and agent of the borrower, but it did not appear with whose money. In a question between a party holding an incumbrance intervening between the assigned incumbrances and the bond and disposition in security,— Held that the presumption was, that the prior incumbrancers were paid with the money of the assignee; and, as there was no evidence to the contrary, that (affirming the judgment of the Court of Session) the assignment conferred a preference over the intermediate incumbrancer.

Arrears due on the prior incumbrances mentioned above were, from omission, not assigned till a subsequent period, when they were separately conveyed to the same party.—Held (also affirming the judgment of the Court of Session) that the lender was not bound to compute payments of interest, previous to the assignment of the arrears on the sum lent by him towards extinction of these arrears, in diminution of his security.

1st DIVISION.

Lord Ordinary Cockburn.

Statement.

THE late Alexander Hume Macleod, of Harris, by a deed of settlement dated the 17th June 1811, con-

[1] 16. D., B., & M., 311.

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veyed the estate of Harris, in which he was infeft, his eldest son Alexander Norman Macleod, subject certain burdens therein specified, and, inter alia, of annuity of 300*l.* payable to his youngest son Donald Hume Macleod during his life, and in the event of his having lawful children living at the time of his death to such children, equally amongst them, during their respective lives.

On the death of Mr. Macleod, in 1811, he was succeeded by Alexander Norman Macleod, who was infeft on the above disposition and deed of settlement, under the burden of the provision or annuity in favour of his brother Donald Hume Macleod and his children.

On the 17th September 1812 Alexander Norman Macleod executed a heritable bond in corroboration of the annuity of 300*l.* This deed contained warrant for infefting Donald Hume Macleod in the estate of Harris in security of the annuity, and he was duly and validly infeft accordingly, conform to instrument of sasine dated the 13th November 1812.

At Whitsunday 1828, Mr. Donald Hume Macleod conveyed, by a trust disposition, the above annuity and arrears thereof to the appellant and another trustee (since deceased), and the survivor of them. These trustees were duly infeft on the trust disposition in the month of July 1829.

On the 3d November 1817 Alexander Norman Macleod granted a heritable security over the lands of Harris in favour of Mr. Grant of Kilgraston for 25,000*l.*, then borrowed from Mr. Grant, who was infeft thereon on the 9th February 1818. After the death of Mr. Grant the bond passed into the hands of trustees appointed by his settlements, who completed their title

to it, and subsequently granted, in the month of November 1823, a disposition and conveyance thereof in favour of Mr. Gordon of Milrig, who was infeft thereon, and the infeftment duly recorded in the month of March 1824.

Besides the original security thus vested in Mr. Grant, there were in existence four different bonds and infeftments affecting the estate of Harris, which had been granted by Mr. Alexander Hume Macleod in the years 1804, 1807, 1808, and 1810; and it was stipulated in the treaty for the loan of 25,000*l.*, that these securities were to be conveyed to Mr. Grant, and to be held by him as collateral securities for the 25,000*l.* and interest. These securities were conveyed to Mr. Dallas, the trustee and agent of Mr. Macleod, by whom they were conveyed to Mr. Inglis, who succeeded him as agent and trustee, but there was no direct evidence to show with whose money they had been procured from the holders. There were also in existence certain other securities granted in favour of several members of Mr. Macleod's family, which were of a date posterior to the collateral securities thus held by Mr. Grant.

The heritable bond and disposition in security, dated 3d November 1817, as well as the interest of the trustees of Mr. Grant in the collateral securities, are now duly vested in the respondents, who are the accepting trustees under the settlement of the late Mr. Gordon of Milrig.

In a process of ranking and sale instituted by creditors, the estate of Harris was sold to the Earl of Dunmore for 60,000*l.*; but this sum proved insufficient for the payment even of the heritable debts secured over it.

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The appellants claimed to be ranked and preferred on the price obtained by the sale of the estate of Harris, according to the priority of their sasines; while the respondents contended that they were entitled to be ranked, in virtue of the collateral securities vested in them, according to the priority of the sasines in favour of the original creditors therein.

Judgment of Court, 16th Jan. 1838.

On the 6th December 1837 the Lord Ordinary made avizandum to the Lords of the First Division, who, on the 16th January 1838, pronounced the following interlocutor:—"The Lords having advised the "competition with the claim for the trustee of "Mr. Macleod, and also for the trustee of Gordon "of Milrig, repel the objections stated to the interest "and claim of preference for Gordon of Milrig's "trustees, and rank and prefer the said trustees in "terms of their claim, and decern and remit to the Lord "Ordinary in the ranking to proceed farther as shall "be just."

Against this interlocutor the appellants appealed.

Appellants Argument.

Appellants.—The collateral securities founded on by the respondents, which are prior in date to the infeftments founded on by the appellants, were conveyed to trustees for Alexander Norman Macleod, who was the debtor in these securities, and they were thereby extinguished; for the same party is not capable in law of sustaining at one and the same time the characters of debtor and creditor in the same debt, or of being debtor to himself or creditor to himself, and a conveyance to a trustee for a party is in its legal effects the same thing as a conveyance to the party himself.

Appellants Argument.

According to the settled law of Scotland, where debts are acquired by the debtor therein, where "the same "person becomes both debtor and creditor in them, "and so is not only vested activè with the right of "the debt, but passivè subjected to the payment of it," the debt or obligation is dissolved and extinguished confusione, "for no person can be debtor or creditor "to himself."[1]

Supposing that the respondents were entitled to found upon the collateral securities in competition with the appellants, deduction ought to have been made from their amount, or credit given, to the extent of the interests which the respondents have received on the debt for 25,000*l.*, since the said securities were acquired by them, instead of their being allowed to rank for the total amount of the collateral securities, accumulating the annuities and interests from the date at which they were conveyed to them to the present time.

Respondents Argument.

Respondents.—As the collateral securities, with the infeftments thereon, have been transferred to and are now vested in the respondents, they are entitled to be ranked on the price of the estate of Harris, in preference to the appellants.

The infeftments on the collateral securities have never been extinguished by confusion or discharged by deed, and they remain as preferable burdens on the estate, and as such have been validly conveyed and assigned to the respondents, who were entitled, in virtue of the personal obligation contained in their bond, to

[1] Erak. b. iii. tit. 4. sec. 23. & 27.; citing 21st Dec. 1680, Cuningham (Dict. 3038), Kerr v. Turnbull, 15th Feb. 1758, Dict. 15551; Devaynes v. Noble (Clayton's Case), 1 Merivale Reports, 604.

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apply the interest received by them in extinction of the interest accruing on the principal debt. They were not bound to apply it in extinction of the annuities or interest due on the collateral securities, which they were entitled to keep up as debts against the estate to their full extent as securities for payment of the principal sum.[1]

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this case, which was argued before your Lordships some considerable time since, involves a question which appears not to be a subject of much discussion in Scotland, but which is not of unfrequent occurrence in this country, the contest being between different incumbrances on an estate which was made the subject of a family settlement in the year 1811. It appears that the father of the author of that settlement had contracted various debts, which he had made charges upon the estate to which he was absolutely entitled. In 1811 the settlement was made, under which interests are claimed by the younger branches of the family, those parties contesting with a creditor of a subsequent date, that is, of the year 1817, for a sum of 25,000*l.*; the contest not being with respect to the instrument creating the debt of 25,000*l.*, but between the family, who claim under the settlement of 1811, and the creditor for 25,000*l.*, who, in addition to the security which he had taken from the then owner of the estate, had assigned to him the securities for a debt anterior to the year 1811, namely, four securities, one of the year 1804, another of 1810, another of 1807, and another of

[1] Johnston, 20th July 1610, Dict. 3035; Ersk. b. iii. tit. 4. sec. 24, 26, 27.

1808; and the question is, whether as between the parties claiming under the settlement, and the creditor for 25,000*l.* under the instrument of 1817, that creditor for 25,000*l.* is entitled to avail himself of the securities for the debt anterior to 1811? The author of this settlement was absolutely entitled to the estate. If he had not been absolutely entitled to the estate according to the law of Scotland and to the law of this country, there can be no doubt that on paying off the prior debts it would be competent to such a party to deal with these securities, either for his own benefit or for the purpose of conferring a prior claim on other creditors to whom he might become indebted; but the question is, whether he, being the absolute owner of the estate, under the circumstances which appear upon these proceedings, was entitled, by assigning these prior securities to the creditor of 1817, to give him a priority over those who claim under the settlement of 1811.

My Lords, if the case had simply been that the owner of the estate had paid off those debts and taken the assignment for his own benefit, then a question would have arisen under the law of Scotland, which appears not to have been the subject of discussion in that country. I find that the Lord President and the other Judges differ in opinion as to that, and no case was cited at your Lordships bar, or appears to have been cited below, as to what would have been the effect of an assignment under these circumstances. In this country the law would have been perfectly well known, inasmuch as it has been the subject of decision, that, as between parties claiming incumbrances on an estate, the owner of the estate being absolutely entitled

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to it subject to charges, if he pays off the prior charges cannot set up those prior charges for his own benefit as against those who claim subsequent incumbrances upon the estate. My Lords, upon the view I take of this case, after a careful examination of all the papers and all the facts as they appeared before the Court of Session, it does not appear to me that your Lordships will be called upon to consider that question, because one proposition appears to be common to the law of both countries, namely, that if a subsequent incumbrancer advances money, and it is part of his contract that he shall have an assignment of the prior incumbrance, that then he is entitled to stand in the place of that party whose debt is paid off by the money which he advances, and whose incumbrance he procures to be assigned to himself.

One difficulty in this case is, to ascertain accurately and satisfactorily out of what funds these prior incumbrances were paid off; because it is quite clear that the four several securities became the subject of regular conveyance from party to party, without ever having come into the hands of the owner of the estate, Mr. Macleod, but having come certainly into the hands of a Mr. Dallas, who was a trustee and agent for Mr. Macleod. The title to the securities is transferred from the original creditors to other persons, then to Mr. Dallas, then to Mr. Inglis, and ultimately to Mr. Grant, through whom the parties claim the title to the 25,000*l.* Looking, therefore, to the titles as they appear upon the record, the present claimant would appear to be entitled to these incumbrances, which we find vested in certain creditors of debts anterior to the date of the settlement; for instance,

one of the securities was a security of December 1810, which was a heritable bond for 1,500*l.* granted to Mr. Dallas, but not in his character of trustee for Mr. Macleod, but, upon the face of it, as trustee for a person of the name of Bowie. It appears that in 1813, — that is after the settlement, and therefore after the intervention of the now contending claim, — Dallas conveyed to Bowie, son of the party for whom he was originally trustee; that in 1815 Bowie was paid; and in 1817 Bowie conveyed again to Dallas, it then appearing upon the face of the instrument that he had been paid, and it being stated that Dallas had paid that 1,500*l.* From Dallas the security was conveyed to Inglis, from Inglis to Grant, and from Grant the present parties derive their title. I have stated the history of that incumbrance as being one of the most simple; and it is unnecessary for me to occupy your Lordships time in tracing the others, which are, some of them, more complicated in their nature; but the same observation applies to them all, — that they are traced from hand to hand, none of them distinctly coming into the hands of Mr. Macleod.

Then, my Lords, it is said that though they never came into the hands of Mr. Macleod they came into the hands of Dallas, and that they came into the hands of Mr. Inglis, who succeeded Mr. Dallas as agent and trustee for the Macleod family; and that it is therefore the same thing, whether we trace the securities into the hands of Mr. Dallas the trustee, or into the hands of Mr. Macleod, the cestuique trust. My Lords, as I observed in the commencement, if the question turned upon that it would be necessary for your Lordships to consider how the rule of law ought to be laid down as appli-

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cable to these transactions in Scotland; but if, although the securities became vested in Mr. Dallas, who was in fact the trustee for Mr. Macleod, your Lordships have reason to believe, and you are satisfied, that they did not come into the hands of Dallas as trustee for Mr. Macleod, namely, as being the agent who applied the money of Mr. Macleod for the purpose of paying off those incumbrances,—but that it was part of the specific transaction that the other parties who were to advance the money should, for their better security, have that money applied in the payment off of the prior securities, and that they should have an assignment of the securities so paid off, it does not appear that there is any difference between the law of this country and of Scotland upon that subject; but that the law of either of the two countries is, that the party advancing the money would be entitled to have the benefit of the securities paid off with that money, and of which he had obtained an assignment.

My Lords, this creates some difficulty in investigating the facts of the case, inasmuch as it is not very easy to reconcile the dates with the supposition of Mr. Grant's money, in the latter instance, and Mr. Newte's money, in the first instance, having been applied in paying off and satisfying those prior incumbrances. But in dealing with the facts upon which the evidence is not very satisfactory, your Lordships will take into your consideration on whom the burden lies of proving the fact one way or the other. I have stated to your Lordships, that according to the conveyances they are all traced from hand to hand, from those who were clearly entitled to hold them as against those interested under the settlement until they come into

the hands of those now claiming under the settlement. Assuming for that purpose Dallas to be a stranger, and not affected by his character of trustee of Mr. Macleod, the title therefore apparently is good, and it lies upon those who impeach that apparent title to show that those parties, some of them at least,—Dallas, for instance, was not entitled to hold these adversely to those claiming under the settlement, because he was trustee for Mr. Macleod. Now, if those who are to impeach the primâ facie title have not satisfactorily made out a case which would justify your Lordships in considering that primâ facie title as affected by anything appearing upon the record, the title of course will stand, because there is no case in equity to affect that legal right.

Now, in the first place, nothing can be more improbable than that which must be assumed as fact in order to suppose Dallas to have held simply as trustee for Mr. Macleod. It appears that this was a property very much incumbered; it is very evident that the owner of the estate was subsisting in fact by means of what he derived from the estate; he was not a man who had much command of money, and when it was necessary to procure money for the purpose of paying off one incumbrance he was under the necessity of applying elsewhere for a loan of money in order to do it. In short there is nothing which appears to render it probable that Mr. Macleod, the owner of the estate, had money to put into the hands of Dallas, as his agent, to pay off these incumbrances. In some cases,—in the case of the 10,000*l.* procured in the year 1813 from Newte, out of which several prior incumbrances were paid, it is on the face of it stated that the 10,000*l.* was applied

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in paying off Mr. Howard's incumbrance of 2,000*l.* in part; and other advances are subject to the same observation. But then, again, if we merely look to the dates, it will not be very easy to reconcile them with the supposed history of the transaction. But of that fact there is no doubt, because it is actually recited upon the face of the deeds; and when we come to Mr. Grant, who advances 25,000*l.*, there is a great discrepancy between the dates as they appear and the supposed period at which the money must have been advanced to pay off the prior incumbrances. But there is an account stated in the papers showing the periods at which Grant advanced part of the money, and there is a memorandum which shows that although the money came under the administration of Dallas in the first instance, and of Inglis afterwards, that it was money not put into their hands as the money of Mr. Macleod, but put into their hands as money to be applied for the purpose of paying off the prior incumbrances with a view to the security of Mr. Grant, who was advancing the 25,000*l.* It appears, for instance, that in November, 1817, 3,200*l.* was advanced, and that at subsequent periods, going through the latter end of 1817 and into January 1818, other sums were advanced, in the January of 1818 the sum of 10,000*l.* being advanced; and there is this note:—"The loan, with deduction of the "3,200*l.* received on 3d November, was lodged with "the Commercial Bank of that date, on their note pay- "able on demand to Mr. Grant's agents and deposited "with J. R. and W., with declaration of trust that the "money was to be employed at our joint sight in pay- "ing off certain existing incumbrances." Now that corresponds with the statements in some of the deeds,

and is not met by any evidence on the other side, except that which might be derived from the different periods at which the securities appear to have been executed.

Now, that undoubtedly may to a certain degree be accounted for by the necessity of having the money at command before the prior incumbrances could be bought up; and of course those who had the prior incumbrances were not likely to part with the legal security unless they had the money in hand which was to be the purchase money of those securities. But whatever difficulty there may be in reconciling the case, I have in vain looked for any evidence on the part of those interested under the settlement to shake that which not only is the probable state of the case, but which is actually proved to be the case in more instances than one; and which from the memorandum which I have now read appears to have been the course adopted, as naturally might be expected, namely, that the parties advancing the money put the money in medio, not in the possession of the debtor Mr. Macleod, but under the control of persons, and in trust till it could be applied for the purpose for which it was intended, namely, buying up the prior incumbrances, which were to be assigned to the new creditor.

My Lords, in the Court below there was a difference of opinion: the Lord President differed in opinion from the three other learned judges, and in delivering his judgment his Lordship says:—"I consider this case "to be attended with great difficulty; there are ques- "tions of much nicety involved, but the inclination of "my opinion is that the collateral securities were "extinguished at the time the original debts contained "in them were paid and the debts and securities

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" conveyed to Dallas. It is not disputed that Dallas " was the mere trustee of Mr. Macleod." Now, it was not disputed that Dallas was the trustee of Mr. Macleod: he was in one sense undoubtedly acting as the trustee of Mr. Macleod, but it is quite contrary to the whole evidence in the case to assume that he was the mere trustee of Mr. Macleod in this transaction, and that money in the hands of Dallas was as if it had been in the hands of Mr. Macleod. But, however, the Lord President appears to have considered that such was the result of the evidence:—" Dallas did " not advance funds of his own in paying off the debts " of Mr. Macleod which were conveyed to him; these " debts were paid off with money borrowed by " Mr. Macleod under a new loan." His Lordship there says, that the fact was satisfactorily proved to his mind that the debts were paid off with money advanced. Now, if that were the real state of the transaction it is perfectly incredible to suppose that the party advancing the money, intending that the old securities should be bought up, should put that under the control of Mr. Macleod: the two propositions are perfectly irreconcileable with each other; and " it seems to me that " matters are substantially in the same situation as if " Mr. Macleod, being debtor in various heritable debts, " had borrowed money, paid the debts, and been " assigned to them." Undoubtedly, if he had done that, there would have been no title in the parties to stand in the situation of original creditors. But that not only is not proved, but the converse appears, as far as the evidence goes, to be satisfactorily established, and it is that which, according to the ordinary dealings between man and man, would have been the course of

proceeding. "But if that had been the precise shape "of the transaction it is difficult for me to understand "how he could thereby keep up the debts and securities "against himself and his fee simple estate. I never "heard of such an attempt having been made: it is "quite different where there is an entailed estate."

The other learned judges differ in opinion from his Lordship, and seem to me to put it upon a ground which is much more satisfactory, much more consistent with the evidence as it appeared before the Court, and much more free from any of those violent suppositions which must be entertained if you suppose the party to have advanced the money, not taking care to have it kept safe till it was applied in buying up the securities, but putting it at once into the hands of the debtor; the effect of which would have been, that, having no security whatever for the payment off of the prior incumbrances, the 25,000*l.* would have been advanced not only without the security of the earlier deeds, but actually subject both to the incumbrances under the settlement and the charges to the prior creditors. Mr. Grant, and those who acted for him in advancing 25,000*l.* upon the estate although encumbered by creditors to a very great extent and by the charges of the settlement, must be supposed to have advanced that money not only without taking care to stand in the place of the original creditors, but to come third, namely, after the prior creditors and after those named in the prior settlement, inasmuch as he, whatever he might have intended, would have no security for being paid till the other parties had been paid out of the money so advanced.

Now, my Lords, that supposition appears to me

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to be very incredible, and to be contrary to evidence, as far as it can be considered as provi the nature of the transactions between the parti and it is contrary to what is proved by some of deeds; and though there is some confusion in evidence with respect to the dates, yet I cannot th that your Lordships would feel yourselves safe in p ceeding upon an assumption which is totally differ from that which appears to be the nature of transaction in those particulars, so far as you able to trace it. Upon the law there is no questi because, independently of that point to which I h adverted, which appears to me not to arise in this c there is no doubt that if the money was advanced the purpose of taking up the prior securities,—that be part of the contract,—and if the money was applie that purpose, and those prior securities were afterwa conveyed and assigned to the parties advancing t money, there is no doubt that the original incumbran existed, and existed for the benefit of the parties v had advanced the 25,000*l.*; and beyond question t would be entitled to preference over those who cl under the settlement.

My Lords, it is said that this is a case of gr hardship upon those who claim under the settlem That argument will not influence your Lordships your decision upon this case, because that decision m be regulated by the principles of law. But it is easy to see how the hardship exists: the other par take under the prior incumbrances, which were effec for the benefit of those who were the original credit namely, Mr. Howard and other persons who held securities anterior to the date of the settlement:

interests of those claiming under the settlement are not prejudiced by having the securities transferred to other persons; they come with an equal degree of priority upon the estate; whether Mr. Howard claims his debt, or whether those who now claim the benefit of that incumbrance stand in his place, their interest is the same.

My Lords, there is one other question, and only one, to which I will call your Lordships attention, though it was one not much pressed in the argument, and does not appear to me to create any difficulty in the decision: it is with reference to the interest of those securities. The original debt of 25,000*l.* had interest paid up to a certain time,—the date is not material; the securities were assigned; but it appears there was an omission in the assignment, and there being arrears of interest due upon those securities, it was not until a subsequent period, I think in the year 1834, that the arrears of interest were assigned upon the securities which had been the subject of a prior conveyance. One point which is made is, that the interest which had been paid upon the 25,000*l.* ought to be applied in reduction of the interest upon the securities, and not in reduction of the interest upon the 25,000*l.*, the effect of which of course would be to increase the debt and diminish the securities; whereas it is obviously the interest of those who claim the benefit of the 25,000*l.* to reduce the debt and increase the securities. What appears to me to be a very satisfactory answer, provided the facts were such as to make it necessary to give that answer, is, that the party receiving interest or receiving any money,—there being two accounts to either of which it may be applied, is entitled to refer it to that one for

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which he has the least available security, and of course it would be his interest to apply it to the 25,000*l.*, and not to the reduction of the securities for that 25,000*l.* It appears to me that there is another answer to the argument raised against the party now claiming under the 25,000*l.*, namely, that the interest was paid, and paid upon the 25,000*l.*, anterior to the period at which the securities were assigned. The interest ran upon the securities, and increased the debt secured by those instruments; it was an addition to the heritable bond; it was an additional charge upon the estate; and when they were assigned to the parties now claiming the benefit of them, it was an assignment of that which the parties to whom they were assigned, not having had the possession of, even if they had been compelled so to do, had not the means of applying in satisfaction of the interest of the 25,000*l.* It appears to me, therefore, that they did not come into hands which could have applied them in satisfaction of the interest of the 25,000*l.*; and if they had, the party receiving that interest was undoubtedly entitled to apply it in satisfaction of that debt for which he had the least available security. My Lords, under these circumstances, though it could have been wished that the facts had been such as would have enabled your Lordships to come to a more clear and satisfactory conclusion, yet it does appear to me that there is quite sufficient evidence to lead your Lordships to the conclusion, that the decision of the majority of the learned judges of the Court below is right and that the present interlocutor ought to be affirmed.

My Lords, there having been a division of opinion in the Court below, perhaps your Lordships will be

of opinion that the interlocutor should be affirmed, but with no costs.

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It is ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor, so far as therein complained of, be and the same is hereby affirmed, without costs.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Solicitors.

[*23d April* 1839.]

(Appeal from Court of Session, Scotland.)

(No. 6.) MATTHEW MONTGOMERIE, Assignee of JOHNSTONE of CURRIE and others, Appellant. — *Pemberton — Sandford.*

Sir JAMES BOSWELL, Baronet, Respondent.[1] — *Attorney General (Campbell) — Maconochie.*

Practice — Jury Trial. — In an action, in which the main question in dispute was, whether a party had intromitted with his father's effects, the Lord Ordinary found, 1st, "That further investigation is necessary;" and, 2d, "That no sufficient cause is assigned for departing "from the general rule for ascertaining disputed ques- "tions of fact;" and therefore remitted the cause to the Jury Roll. On reclaiming, the Court refused the desire of the note as incompetent; Quoad ultra, of consent recalled the interlocutor of the Lord Ordinary hoc statu, in so far as it contains findings in the cause, and remitted to proceed as shall be just. An application was then made to retransmit the cause to the Ordinary Roll of the Court of Session, which was refused. On reclaiming, the interlocutor refusing was recalled, and the Court remitted to the Lord Ordinary to retransmit the cause to his Lordship's Court of Session Roll, and to order a proof by commission. The House of Lords reversed the judgment, but on the ground that the Lord Ordinary was right in directing a trial by jury, as the question was one which it was fit and proper so to try.

Question, whether an interlocutor of a Lord Ordinary directing trial by jury in an unenumerated cause can competently be submitted to review?

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[1] 14 D., B., & M., 378; ibid. 681; 16 S. C., D. & B., 395; ibid. 1086.

MONTGOMERIE v. BOSWELL. 23d April 1839.

1ST DIVISION.

Lord Ordinary Fullerton.

THE late Sir Alexander Boswell of Auchinleck was at the time of his death, in March 1822, indebted to Alexander Boswell, writer to the signet, in the sum of 2,794*l.* 10*s.* 8*d.*

At the date of his death Sir Alexander was possessed of the entailed estate of Auchinleck and also of unentailed heritable property to a considerable extent.

Sir James Boswell, son and heir of Sir Alexander, made a proposal to the personal creditors of his deceased father, under which he offered to pay them a certain composition, on condition of his obtaining a discharge, and being thereby enabled to take up the whole succession of his father unburdened by any claim of personal debt.

In pursuance of this arrangement, Sir James paid the greater proportion of the creditors the stipulated composition, with the exception of Mr. Alexander Boswell, who refused to accept.

The appellant, Mr. Montgomerie, being a creditor of Mr. Alexander Boswell, used arrestments in the hands of Sir James Boswell of all sums due by him to the said Alexander, either personally or as representing his late father; and these arrestments were followed up by an action of multiplepoinding.

It having been made a question in this action whether Sir James Boswell represented his father, a commission for recovery of written documents was granted in the course of the proceedings, and the Lord Ordinary after hearing parties pronounced the following interlocutor: — " 19th December 1835. — Finds, that " the question mainly in dispute between the parties is " the question of fact, whether or not the nominal raiser " of the multiplepoinding and defender in the furth-

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"coming, Sir James Boswell, intromitted with the "unentailed property and effects of his late father "Sir Alexander Boswell: finds, that Mr. Mont- "gomerie, the real raiser, and the pursuer of the "furthcoming, declines to confine himself to the evi- "dence in support of his case already recovered under "the diligence formerly granted: finds, that no suffi- "cient ground has been stated for departing in this "case from the usual course for ascertaining disputed "questions of fact, and therefore remits the case to "the jury roll."

Against this interlocutor Sir James Boswell presented a reclaiming note to the First Division of the Court, praying their Lordships "to recall the remit to the "jury roll, and to remit to the Lord Ordinary with "directions to grant a diligence to both parties, and "to grant a commission for a proof, in so far as the "testimony of witnesses may be offered or required by "either party."

Judgment of Court, 29th Jan. 1836.

On this reclaiming note their Lordships pronounced the following interlocutor: "29th January 1836.— "Recall the interlocutor of the Lord Ordinary, and "remit to his Lordship to grant diligences to the "parties, or to grant a commission for proof, or to "proceed otherwise in the cause as to his Lordship "shall seem just."

The appellant, Mr. Montgomerie, being apprehensive that this interlocutor might be held, in the circumstances, entirely to preclude his being allowed the benefit of a trial by jury in the case, presented a petition for leave to appeal as from an interlocutory judgment; and the following interlocutor was then pronounced: "10th March 1836.—The Lords having

"advised this petition with answers thereto, and heard counsel, refuse the desire of this petition, in respect that, according to the true meaning of the interlocutor remitting the cause to the Lord Ordinary, diligence should in the first place be granted for recovering documentary evidence; and that on considering such evidence the Lord Ordinary should judge whether any farther investigation should proceed by a proof on commission or otherwise."

The case having returned to the Lord Ordinary, a fresh commission for recovery of written documents was granted; and parties having been again heard, the following interlocutor was pronounced by his Lordship: "5th December 1837.—In respect that the pursuer does not confine himself to the written evidence now in process, but demands a farther proof by witnesses, and that the defender does not maintain that the said written evidence is such as to exclude parole proof, finds that farther investigation is necessary; and finds that no sufficient cause is assigned by the defender for departing from the general rule for ascertaining disputed questions of fact, and therefore remits the case to the jury roll."[1]

[1] "*Note.*—The question between the parties is truly a question of fact, viz. whether or not Sir James Boswell, the defender in the action of forthcoming and the nominal raiser in the multiplepoinding, took possession of the unentailed property of his late father Sir Alexander Boswell and intromitted with his personal effects. Under the diligence originally granted, and that which has been since issued agreeably to the remit from the Court, a vast mass of papers, consisting of letters, vouchers, and accounts, has been recovered. But, on the one hand, Mr. Montgomerie, who is truly the pursuer, states that he does not confine himself to that written evidence, and proposes to fortify it by

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Judgment of Court, 27th Jan. 1838.

Against this interlocutor Sir James Boswell again reclaimed to their Lordships of the First Division, and the following interlocutor was pronounced: "27th "January 1838.—The Lords having advised this

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"the examination of witnesses; on the other, it is not contended by Sir "James Boswell that the documents are conclusive of his defence, and "are such as to exclude parole proof. There being no doubt, then, that "some farther investigation is necessary, the only point is, whether it "shall proceed by jury trial or by proof on commission.

"In considering this point it must be kept in view, in the first place, "that this is not a case in which both parties concur in resorting to a "proof by commission; and secondly, that the jury trial is demanded "by the pursuer, who manifestly has a legitimate interest to insist in a "course of investigation peremptory in its forms and conclusive in its "results, in preference to that required by the defender, which in practice "admits of being indefinitely protracted, while the conclusion of it only "forms the opening of a litigation on its import competent in every "successive tribunal from that of the Lord Ordinary to the Court of "last resort.

"In these circumstances the Lord Ordinary thinks that nothing short "of a conviction that the case was absolutely unfit for the consideration "of a jury would warrant him to depart from the ordinary course; and "after hearing the matter argued, he remains of the opinion that there "is no sufficient ground for refusing the pursuer's motion.

"In the first place, though there are now recovered and put into "process on the part of the pursuer an enormous collection of papers, "which from their nature might perhaps afford the materials of a very "intricate accounting, that does not appear to be the true character of "the inquiry. There is no question here as to the amount of the "intromissions with which the pursuer is charged, and no pecuniary "result, in the proper sense of the term, is sought to be inferred from "these papers by the pursuer. The only point which he seeks to "establish is, that the defender took possession of the unentailed estate "and personal property of the late Sir Alexander Boswell. The Lord "Ordinary understands, that these documents, or part of them, are to "be adduced in support of that averment, and, for any thing yet seen, "the use to be made of those materials may be such as to render a very "limited selection of them necessary; and the combined investigation "of them and of the parole evidence of the factors, managers, or other "witnesses examined in relation to them may turn out to be a much "more convenient and satisfactory procedure for reaching the truth than "a proof by commission.

"Secondly, the demand of the pursuer is unquestionably agreeable to "the general rule, sanctioned by statute, for the investigation of disputed "matters of fact; and it would seem inexpedient and improper to adopt

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"reclaiming note, and heard counsel for the parties, "refuse the desire thereof as incompetent, in so far as "it reclaims against an order remitting the cause to "the jury roll. Quoad ultra, of consent recall the "interlocutor of the Lord Ordinary hoc statu, in so "far as it contains findings in the cause; and remit to "the Lord Ordinary to proceed as shall be just."

The case having again returned to the Lord Ordinary, the respondent, Sir James Boswell, moved that the cause should be retransmitted from the jury roll to the ordinary roll of the Court of Session. The Lord Ordinary pronounced the following interlocutor: "14th "February 1838.—The Lord Ordinary, having heard "parties procurators on the motion of the defender to "retransmit the case to the ordinary roll on the ground "that it involves matters which cannot be satisfactorily "investigated by a jury, in respect that the pursuer "does not confine himself to the written evidence "now in process, but demands a further proof by "witnesses, and that the defender does not maintain "that the said written evidence is such as to exclude "parole proof, finds that further investigation is

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"a different course in opposition to that demand, founded on what at "best must be but a presumptive and hypothetical view of his case. "The Lord Ordinary is not entitled to anticipate, and the pursuer "cannot be called upon, at present, prospectively to open the kind of "case he is to submit to the jury; and when the proper time comes for "his doing so, and if it shall turn out from the statement for the pur- "suer that it is utterly unsuited for the consideration and determination "of a jury, experience has shown that there are practically the means "of obliging the pursuer to withdraw his case from that tribunal, and "to adopt a course of investigation better fitted to do justice between "the parties.

"On these grounds the Lord Ordinary does not conceive himself "warranted in refusing the pursuer's motion for a remit to the jury "roll."

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"necessary; and finds that no sufficient cause is "assigned by the defender for departing from the "general rule for ascertaining disputed questions of "fact by the verdict of a jury, and therefore refuses "the motion."[1]

Against this interlocutor Sir James Boswell reclaimed to the First Division of the Court, and their Lordships pronounced the following judgment: "12th May 1838. "—The Lords having considered this reclaiming note, "and heard counsel for the parties, alter the inter- "locutor reclaimed against, and remit to the Lord "Ordinary to retransmit the cause to his Lordship's "Court of Session roll, and to order a proof by "commission."

Judgment of Court, 12th May 1838.

Against this interlocutor the appellant appealed.

The parties put in issue the general question of competency of reviewing a Lord Ordinary's interlocutor ordering a cause to be tried by jury, but the House of Lords reversed, simply on the ground that the Court were in error in considering the question between the parties not fit to be tried by jury. An analysis of the statutes bearing upon the general question, with some valuable observations, will be found at the close of the Lord Chancellor's speech.

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[1] "*Note.*—As by the former interlocutor of the 5th of December 1837 "the Lord Ordinary did not merely remit the case to the jury roll "subject to the contingency of being retransmitted, but found expressly, "after an argument on the point, that it was fit for the consideration of "a jury, he considered that the interlocutor might be competently "brought under review,—and indeed he so expressed it,—for the very "purpose of enabling the defender to take the opinion of the Court, as "had been done before. But as that procedure was found incompetent, "and as the question has now been again raised in the form of motion "to retransmit to the ordinary roll, he sees no reason to alter his former "opinion; and therefore repeats the interlocutor, mutatis mutandis, and "the reasons given in his former note."

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"shall be united with and shall form part of the "ordinary administration of justice in the Court o "Session in Scotland." Since the passing of this act in place of there being a jury court to which case were transmitted by the Lords Ordinary, each Lor Ordinary has possessed a jury roll, to which cause appropriated to jury trial are remitted by him; h himself thereafter proceeding to mature these case for trial in the same way in which the now abolishe jury court would have done.

Where the interlocutor of the Lord Ordinary remit a case to the jury roll on the ground of its being prope for jury trial, no reclaiming note to the Inner House i competent against that interlocutor; and this being so it is difficult to perceive how the power of review shoul be gained merely by directing the reclaiming not against the interlocutor of the Lord Ordinary refusin to retransmit the case to the Court of Session roll a unfit for jury trial. The refusal to retransmit is i fact, like the remit itself, a finding by the Lord Or dinary that the case must be tried by jury. The twelft section of the 59 Geo. 3. c. 35, which appears to hav given rise to some misapprehension in the Court o Session, does not apply, as the jury court has ceased t exist as a separate tribunal.

2. Supposing the Inner House had a discretionar power of review, the interlocutor was erroneously al tered, inasmuch as the case was an apt and proper on for a jury trial, and not for a proof on a commission.

In order to entitle the respondent to obtain th judgment under appeal, the onus lay upon him t prove in a clear and satisfactory manner that the cas was one which was not fitted for trial by jury. Th

general rule established by the statutes, and by the practice of the Court of Session following on those statutes, unquestionably is, that all cases involving disputed matters of fact must be tried by jury; and in order to withdraw any individual case from a jury, it is necessary to substantiate good and sufficient reasons for holding that case to form an exception to the general rule; the now settled system of the Court of Session is to send all cases involving disputed matters of fact to a jury, unless very sufficient grounds are shown for an opposite course.

This case is of a character which renders it peculiarly fitted for the cognizance of a jury, as it is one in which the whole question is substantially one of fact, and hinges upon the mere fact of intromission by the respondent with the estate and effects of the deceased Sir Alexander Boswell his father. Assuming that a question of law might arise, this forms no reason whatever why the case should not be tried by jury, for in almost every case which is tried by jury a question or questions of law are involved; and as cases are sent for trial on a general issue, there can scarcely occur one in which there is not matter of law for the direction of the judge; and if this were a reason for withdrawing cases from the cognizance of a jury, there would be scarcely a single case tried. So little has the objection now considered weighed in the practice of the Court with reference to a case of the present kind, that the very issue of vitious intromission, out of which a question of law too delicate for a jury is supposed to arise, is in use to be sent to trial as matter of ordinary course. A case is reported in which the issue runs in these identical words:—" Whether

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"subsequent to the death of the said Robert Penma "the defenders or any of them vitiously intromitte "with the funds and effects of the said Robe "Penman?"[1]

Appellant's Argument.

The mere amount of documents recovered under commission in the preparation of a cause forms no sor of test whatever of the extent to which these document will afterwards be used in the actual trial; the com mission forms the mere instrument for the recovery c such documents as by possibility may be used on th trial. It is employed to recover all manner of writing without any discrimination, in the first instance, betwee what is admissible and what is inadmissible evidence and from this mass the selection is made at the trial, o what is to be given in as evidence; and in this way very large mass of recoveries often presents the smalle possible extent of actual available documents.[2]

Respondent's Argument.

Respondent.—1. It is admitted that by the law an practice of Scotland the Court of Session has power t ascertain disputed facts by ordering a proof to b taken on commission, by remit, or in presentiâ, in a causes, with the exception of those appropriated t jury trial by special statutes; and it will be kept i view that the Court of Session possesses the powers an jurisdiction both of the Courts of Common Law an the Courts of Equity in England, besides decidin admiralty and consistorial questions, including a va

[1] Kerrs & Co. v. Penman, 11th Jan. 1830; Murray's Jury Report vol. v. p. 143.

[2] Ersk. b. iii. tit. 9. sec. 49, 53. and note; Macfarlane, Practice Jury Causes; Scott v. Lord Belhaven, 25th May 1821; Forbes v. Forbe 12th June 1823; Bald v. Kerr, 19th June 1837, 3 Sh. and Maclean, 1. Sir Gibson Craig v. Sir Wm. Rae, 5th Feb. 1822, 1 Shaw, 270, new ed

variety of cases to which trial by jury cannot be beneficially applied.

By the twelfth section of 59 Geo. 3. c. 35. it was provided, "that it shall be competent for the Jury "Court, when it appears to the said Court in the "course of settling an issue or issues that a case turns "upon matter of complicated accounts, or other mat-"ter to which trial by jury is not beneficially applicable, "to remit back the whole process and productions as "aforesaid with their report thereon, in order that the "division, Lord Ordinary, or Judge Admiral may pro-"ceed with the same in such manner as shall appear to "be most expedient for the administration of jus-"tice."

By the thirteenth section of the same statute it is expressly declared, "that nothing in this act contained "shall extend to prevent the Court of Session in "either of its divisions, or the Lords Ordinary (save "and except in the cases concluding for damages "herein-before enumerated), or the Judge Admiral, "unless otherwise instructed as aforesaid by the Court "of Session, to take proof on commission by a remit "or in presentiâ, and thereafter disposing of the cause "in the manner now practised in such cases."

These provisions shew that the Court has full discretionary power to ascertain disputed facts without resorting to a jury trial in all cases except those specially enumerated in the statute.

The twenty-eighth section of the 6 Geo. 4. c. 120. declared, that the actions there enumerated "shall be "held as causes appropriated to the Jury Court, and "shall for the purpose of being discussed and deter-"mined in that Court be remitted at once to tha

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"Court in manner herein-after to be directed." In all other cases the Court of Session was left in possession of full discretionary power to take proof on commission by remit, or in presentiâ, and the Jury Court was authorized as before to retransmit all causes to which trial by jury was not beneficially applicable. By the 1 Will. 4. cap. 69. trial by jury was united to the ordinary jurisdiction of the Court of Session, and under this statute the whole powers formerly possessed by the Jury Court have been transferred to and are now exercised by the Court of Session.

These statutes do not make it imperative on the Court of Session to send a cause for trial before a jury unless it happen to be one of the enumerated actions which have been expressly appropriated by the legislature to that mode of trial; and this construction of the acts of parliament has never been called in question; on the contrary, it is confirmed by numerous decisions of the Court.[1]

2. The course of proceeding adopted by the Court of Session in refusing to send this case to be tried before a jury was highly proper and expedient, because the question turns upon an investigation of numerous and complicated accounts and a great and intricate mass of documentary evidence, so that the cause is one to which trial by jury is not beneficially applicable. The terms of the statute 59 Geo. 3. c. 35. itself are a declaration by the legislature, that there are causes to which jury trial is not beneficially applicable,

[1] Barker, 27th Feb. 1834, 12 S. & D. 500; Kerr, 10th March 1837, 15 D., B., & M., 784; Hutcheson v. Tod, 2 S. & D. 318, affirmed 15th June 1824, 2 Shaw's Appeal Cases, 386; Ralston v. Farquharson, 7 S. & D. 812; Buchanan, 17th Dec. 1836, 15 D. & B. 286.

as it has expressly recognised their existence, and given directions for disposing of them.

By the above statute the discretionary power of retransmission to the ordinary roll is still possessed by the Court of Session, and has never been limited or taken away by any of the statutes which regulate the system of jury trial in Scotland; and the respondent submits, that the present case is one which ought to be retransmitted to the ordinary roll of causes in the Court of Session under the provision of the statute now alluded to, because the question in dispute is one to which trial by jury is not beneficially applicable. If there is one case more than another to which jury trial cannot be beneficially applied, it is the case now under consideration. The enormous mass of papers which the appellant has forced into process could not be explained or made intelligible to a jury during the period of a trial; and, therefore, unnecessarily to subject the cause to this form of trial would be to inflict a serious injury upon the parties concerned, and expose the respondent to the hazard of an ill-considered, rash, and unjust judgment. If this cause be sent back to be tried by a jury, various intricate and important questions of law must be brought under the decision of the judge trying it, and among other questions which would arise, there would be one which this House in a recent case thought it necessary to remit back to the Court of Session, viz., the question of vitious intromission by a minor.[1]

LORD CHANCELLOR.—My Lords, it is unnecessary

[1] Kerr v. Bremner, 14th July 1837, 2 Shaw and Maclean, 895.

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to state to your Lordships the course of pleadings in this cause, which are complicated; the result, however of the proceedings in the cause is to raise a question on the part of the appellant, who contends that the respondent, Sir James Boswell, by having intromitted with the estate of Sir Alexander Boswell, has made himself liable for debts due to the appellant as a creditor of that estate. After a voluminous delivery documents in the cause, the Lord Ordinary considered it a case to be tried by a jury, and accordingly he remitted it to the jury roll for that purpose. There had been an intermediate application to the Court of Session which came to nothing; they considered that at the time it was not proper to be remitted. The Lord Ordinary pursued the inquiry for the purpose of the production of original documents, and then the object of the party having been accomplished by that production he again remitted it to the jury roll to be tried. From that order of the Lord Ordinary the parties appealed to the Inner House, and the judges were of opinion that under the act they had no jurisdiction to interfere with the interlocutor of the Lord Ordinary; and accordingly they declined to interfere with what he had ordered.

An application was afterwards made to the Lord Ordinary for the purpose of transferring this cause from the jury roll into the Court of Session roll, the effect of which would have been, that it should proceed as a Court of Session cause, and not proceed as a cause to be tried by a jury. The Lord Ordinary, adhering to the opinion he had before expressed, that it was a proper cause to be tried by a jury, refused that application; from which order of his refusing the application,

the parties again applied to the Inner House; and the Inner House thought they had jurisdiction to interfere with that order of the Lord Ordinary, and therefore they remitted it back to him with directions to have the cause transferred from the jury roll to the Court of Session roll; which was the main object of the parties who made the application interfering with the order of the Lord Ordinary, and effected the object of the parties, who wished it to be tried by a proceeding in the Court of Session and not by a jury. Against that last order the present appeal is presented.

My Lords, there were two questions discussed at your Lordships bar: the first was, whether under the section of the act of parliament, the Court of Session had power so to deal with the order of the Lord Ordinary; that is to say, whether by the course adopted they had the power of interfering and altering the decision of the Lord Ordinary directing the cause to be tried by a jury? The second was, whether, if that jurisdiction existed, it was wisely exercised in the particular case in question? I shall call your Lordships attention to the second point first, because, if your Lordships should agree with me in the opinion I have formed as to the nature of this cause and the proper tribunal before which it should be tried, it will not be necessary for your Lordships to come to any decision upon the first point. The question between the parties is simply this: the appellant says, you the respondent have so dealt with the estate of your father, by interfering with the personal estate and by interfering with the real estate, that you have by the law of Scotland made yourself responsible for all the debts for which your father was liable. That depends upon the fact of how far the

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respondent has or has not interfered with his father's property.

My Lords, we have in this country a case, not frequently arising, very similar in its nature, namely, a claim made against a party charged as executor; that is a party who has taken upon himself to interfere with the administration of the effects, and by so doing become responsible to those who have claims against the estate. It is true the law upon the subject is not the same, but the question to be tried is identically the same in both cases; both depending upon the fact how far the party sought to be charged has or has no interfered with the estate of the deceased. The consequences are very different according to the laws of the two countries, but in considering what is the proper tribunal to investigate such claim the question to be tried is very much the same. By the laws of this country these are questions which are almost uniformly the subject of action, and the subject, therefore, of a trial and investigation before a jury: they turn entirely upon matters of fact. It is true a question of law founded upon those facts may arise, but it is absolutely necessary to ascertain the facts before the law can arise. What degree of interference, and what particular circumstances connected with that interference will make a party liable as executor for his own acts in this country, and what interference will make a party liable in Scotland who takes upon himself to deal with the estate of his ancestor without authority so to do will be matter of law; but, speaking of intromission the circumstances connected with it are purely matter of fact, to be established by the evidence of those who can speak to them, or by the production of documents

by which it will appear what course has been adopted. There has been a large production of documents, which has been complained of on both sides. On the part of the appellant it has been complained that those who were called upon to produce documents had taken upon themselves to introduce many which were not required; but they say, you asked for all documents, and all documents you shall have. The party seeking the documents says, there have been more produced than were required; as on the part of those ordered to produce it is said, there has been an extravagant use of the power the Court gives of calling for the production of documents. Undoubtedly in point of number a great many have been produced, but for the purpose to which they may be used in investigating the facts it is very likely that very few will be required, except such documents as may prove the act of the respondent in interfering with the estate of the deceased. There is no question of accounts which can arise in the course of this cause. The mode in which particular sums have been dealt with,—whether, for instance, they have been received by a factor or an agent,—whether they have been received by that factor or agent on account of the estate, and assuming an authority to interfere with the estate,—or whether they were received by the factor or agent as dealing with the party sought to be charged, namely, the respondent, and acting for him,—may be undoubtedly ascertained by reference to some of those documents; but the purpose for which these documents have been used, and the character in which the property has been interfered with, are undoubtedly facts to be tried between those parties.

My Lords, the judges of the Inner House appear to

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have been impressed up to the last with a conclusive opinion that this was not a case to be tried by a jury, but that it was expedient to carry the investigation further, in order that it might be ascertained whether reference to a jury should be ultimately necessary or not. My Lords, there is a marked difference between the course the statutes prescribe to the Court of Session in directing cases to be tried by a jury, and that which prevails in courts of equity in this country. The courts of equity in this country, except in cases where the question of devisavit vel non arises, exercise their own judgment first upon the matters proved and they resort to reference to a jury only, where, from the facts brought in the course of the hearing before it the Court feels that it cannot come to a satisfactory conclusion. Then it is in the habit of sending an issue to be tried in order that the facts may be investigated by the vivâ voce examination of witnesses in the presence of a jury, and the finding of the jury upon that evidence may give the Court better information upon the facts than the Court might be able to obtain by the mere production of the documents. But the acts of parliament with reference to the Courts of Scotland do not look to that course of proceeding: they enumerate certain actions in which proceedings by trial before a jury are directed without any discretion to be exercised by the Court; then in all other cases it is left to the discretion of the Court; but not to the discretion of the Court, after the Court itself has endeavoured to ascertain the facts and to decide upon them, but to a discretion to be exercised according to the nature of the case and the issue joined between the parties; that discretion being exclusively in the first instance to be exercised

by the Lord Ordinary, unless he feels it necessary from the difficulty of the case not to decide the case himself, but to report to the Inner House.

The first question to be considered is, what is the issue between these parties? Now, in looking through the case as stated on the one side and the other, there is no doubt that the safest way of ascertaining that, is, by referring to one or two statements to be found in the proceedings in the Court below and the mode in which these statements were made; and I think your Lordships will have no difficulty in saying that the whole question to be tried is, how far the respondent in this case has or has not intromitted, and under what circumstances he has intromitted, with the estate of the party in question?

My Lords, in the revised condescendence of Mathew Montgomerie, the appellant, there is this statement:— "Sir Alexander Boswell also left behind him moveable "property and funds to a large extent. This com- "prehended a valuable library and household furniture, "and also a right to a large sum of money, estimated "at 3,500*l.*, part of the fortune which came to him "with Lady Boswell his wife, which was payable on "the death of a Mrs. Cumming, then a very old lady." This article is denied, with the exception "that "Sir Alexander Boswell was possessed of a library and "household furniture, which were sold by the late "Mr. Hamilton Douglas Boswell, the executor cre- "ditor of Sir Alexander. It is admitted also that "Sir Alexander Boswell had a reversionary right, "which was lately recovered by Mrs. Hamilton Douglas "Boswell, the executrix creditor of Sir Alexander, "for behoof of Sir Alexander's creditors, and which

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" amounted to about 2,300*l.* sterling. The respondent " believes that the whole of Sir Alexander's personal " funds and property were considerable." The fifth article of the condescendence is in these terms:—" On " Sir Alexander Boswell's death the nominal pursuer " Sir James Boswell, his son and apparent heir, by him- " self or by others on his behalf intromitted with the " whole or with part of the moveable property left by " his father, taking possession of and realizing the " same, and paying therefrom alleged claims and " debts to some extent." The answer to that is: " The " statements in this article are wholly unfounded, and " are expressly denied."

The next allegation is in these terms:—" In regard to " the unentailed heritable property of the deceased, the " nominal raiser Sir James Boswell also by himself or " by others in his behalf entered into possession " thereof in whole or in part, and drew the rents. In or " about the month of October 1822, a deed of factory " was executed by Sir James, under which the rents " were collected by the factor appointed by him and " accounted for to him or his agents; more particularly " there were so drawn the rents of the before-men- " tioned lands of Willochshill, Dalgere, and Howford, " over which there was no heritable burden, and to " which there was no title on the part of any one, " except that possessed by Sir James on his apparency." The answer to which is: " The statements here made " are also untrue, and are denied."

The next allegation is, " That in the year 1824, and " in or about the month of October thereof, arrange- " ments were made between the creditors of Sir Alex- " ander Boswell and the pursuer, or those acting for

"his behoof, under which a dividend of 2*s.* per pound "was paid to the personal creditors of Sir Alexander. "In the scheme of division Mr. Alexander Boswell "was, after having made affidavit to the debt, ranked "as a creditor for the above-mentioned sum of "2,794*l.* 10*s.* 8*d.*, and on the 11th of January 1825 he "drew the sum of 276*l.* 18*s.* 4*d.*, being the dividend "corresponding to the said claim;" therefore charging the present Sir James Boswell as a party in the arrangement. The answer to that is: "It is denied that any "arrangement whatever as there stated was entered "into between the creditors of Sir Alexander Boswell "and the respondent. The respondent believes that a "scheme of division of part of the personal estate of "Sir Alexander Boswell was made up by Mrs. Hamil-"ton Douglas Boswell, the executrix creditor of "Sir Alexander Boswell, and in that scheme Mr. Alex-"ander Boswell was ranked for the claims here set "forth, and drew the dividend stated," but not under his authority. This, therefore, leaves no doubt as to what is the nature of the case. There is a further statement in the condescendence, thus: "In consequence "of the said transaction Sir James Boswell not only "acquired right to the other personal funds of "Sir Alexander Boswell, mentioned in the said letter "of 1828, but has actually realized the same to a con-"siderable extent, and in particular a sum of not less "than 2,300*l.*" That is also denied.

My Lords, upon this view of the case it appears, therefore, that the contest beween these parties might have been purely a matter of fact, namely, whether Sir James Boswell had or had not done that which these allegations charge him with having done, and

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which he denies. The Lord Ordinary thought that a proper question for investigation before a jury. I do not find any substantial reason stated why it should not be tried before a jury: if it depends upon documents, the documents may be produced before the jury, or the fact may be proved of his having taken the management of the estate by those who will state whether they had so managed on the authority and under the direction of Sir James Boswell or under other authority; which will exempt him from the consequences of the intromission with the property of the deceased. I see no reason why those facts should not be tried by a jury in Scotland, in the same manner as a question of the same nature would be tried in a cause in this country raising that question. The reasons given by the learned judges who have given an opinion that it should not be tried by a jury appear to rest in a great degree on the supposed difficulty of bringing this case before a jury, arising, as I apprehend, from the suspicion that it is a little complicated, because there has been a great number of documents produced; documents which both parties agree were, by far the greater number of them, wholly inapplicable to the present case.

I find the Lord President says: "I think it clear that "a case of this kind should not be sent per aversionem "to a jury. It is chiefly written evidence, apparently, "that will require to be considered, and in applying "the law to the facts of intromission which may "thereby appear I think there is no need for the "intervention of a jury." Lord Gillies says: "I am "not sure but that a general question, whether there "has been vitious intromission or not, may not be

" quite proper for a jury to try, but in this special case " I disapprove of the general remit which has been " made." Lord Mackenzie says: " I think it would be " following an inexpedient course to send this case as it " stands to a jury; I think it would be inconvenient " for a jury to try. It would be better to allow a proof " on commission in supplement of the written evidence, " if this should be necessary." Lord Balgray concurred.

My Lords, it appears to me pretty obvious that if the question had been simply whether on such an issue it was proper to refer the case to a jury, the judges would not have come to the conclusion they did after hearing what can be said upon the documents by the counsel on either side. Looking to the nature of the documents, it appears to me that it is scarcely possible that many of them should be submitted to a jury; but even if a large portion of them were to be submitted to a jury, I cannot see any reason why they should not be submitted accompanied with such observations as may be called for in order to enable the jury to come to the right conclusion on the question, whether the one party or the other is justified in the allegations they have made; namely, whether Sir James Boswell has or has not so intromitted with his father's estate?

My Lords, it is very desirable that cases which in their nature are proper to be tried by a jury, should be sent to that tribunal, not only because it would come to a much more speedy conclusion, but that it would generally come to a much more satisfactory conclusion. The parties know the issue to which the case has come, and see whether they can prove it on the one side, and

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on the other. The Learned Judge who tries the case directs the jury, and if he mistakes there are obvious means of setting that right, instead of incurring the expense and delay which arise from proceedings in the discussion of the evidence submitted to the Court. I see nothing in the nature of the cause, no peculiar circumstances in this case which appear to deprive it of the character of causes which ought to be tried before a jury; therefore, I am of opinion the Lord Ordinary came to a right conclusion upon the form of issue joined between the parties, when he decided that a jury was the proper jurisdiction to which this case should be referred. If your Lordships concur in that opinion it will be decisive of the present case, for all your Lordships have to do is to decide between the opinion expressed by the Lord Ordinary, and the opinion expressed by the judges of the Inner Court who took into consideration the interlocutor of the Lord Ordinary.

My Lords, on the second point, therefore, or rather the first, as it was argued at your Lordships bar, it will not be necessary to come to any decision, but at the same time I think it right to make some observations on the construction which has been put on the acts of parliament relative to trials by jury in Scotland; because this case exhibits, what one is very sorry to see, a direct contradiction in the proceedings in the very same cause. I will refer presently to the directions in the acts of parliament; but if your Lordships will permit me, I will first call your attention to the two interlocutors as they stand, and nobody can doubt, looking to the acts of parliament, that the object and intent of those who framed those acts of parliament

were, that your Lordships should not have to exercise the jurisdiction which you are now called upon to exercise; that the object was to make the consideration of the preliminary point of the jurisdiction by which the cause was to be tried conclusive, in order to avoid the great delay and great expense which arise upon appeals on interlocutory matters. It was seen that if, in every instance in which a question arose whether it was to be tried by a jury or heard before a division of the Court of Session, the cause were remitted in the first instance from the Lord Ordinary to the Inner House, and from the Inner House appealed to your Lordships, that course would be attended with great expense and delay; when your Lordships had decided that question, the cause would have in fact to be commenced. That is attended with an evil too obvious to the parties seeking redress to be permitted, and the statutes were anxiously framed to guard against that consequence.

My Lords, substitution of trial by jury, as your Lordships are aware, was effected by the institution of a separate court for the purpose of trying those issues. The Lord Ordinary deciding that a case was proper to be tried by a jury, the proceeding was immediately remitted to the Jury Court, and the act of parliament declared the interlocutor upon this subject to be final in certain questions, either before the Court of Session, or your Lordships House; the act so limits the power of appeal from the Lord Ordinary. The Lord Ordinary, in the present case directing it to be sent to the jury roll, which is now substituted for the Jury Court, the Court said, we have no jurisdiction to

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interfere; the statutes give the Lord Ordinary absolut power on that point; they therefore refused to interfer thinking, and properly thinking, they had no jurisdictic under the acts of parliament. It being thought exp dient that the matter should be well considered, wheth they had any jurisdiction to interfere with the Lo Ordinary's order that the case should be sent to t jury roll for the purpose of being tried by a jury, t Lord Ordinary being applied to, refused to transfer t cause from the jury roll to the Court of Session ro which had no jurisdiction over it. But though that ord stands as a final order by the acts of parliament, and n other judge has a right to interfere with it, there is subsequent order of the Inner House that the cau shall be transferred to the Court of Session roll. throw out this, because it is worthy of the consideratio of those whose duty it is to come to a decision upo these acts of parliament. It is quite obvious that if th be the proper construction of the statutes, it entire defeats the professed object of the statutes, viz., th the decision of the Lord Ordinary should be final as whether the cause should be tried by Jury or not.

It is well known that when the trial by jury was fir introduced into Scotland it met with very great opp sition on the part of the bar; an opinion fast givi way since the system has come into operation. I wish could add that it was now viewed altogether with much favour as I think it ought to be, and that attemp were not made to get rid of the wholesome provisio of the act of parliament giving jurisdiction for the tri by jury in certain cases.

I will very shortly refer your Lordships to son

of the provisions of the very few acts which have been passed upon this subject, and I think your Lordships cannot doubt that the intention of the acts was not only that you should never have a question of this kind to decide, but that the order of the Lord Ordinary should be final. The act of the 55th Geo. 3. c. 42. directs, "that it shall and may be lawful for "either Division of the Court of Session, in all cases "that may be brought before them during the con- "tinuance of this act wherein matters of fact are "to be proved, to direct issues." The second section directs the Lord Ordinary "to report to the Division "of the Court to which such Ordinary belongs, so "that the said Division may determine whether such "issue shall be sent to the said Court to be tried "by a jury." There the Lord Ordinary had no jurisdiction; the first step was to authorize him to look to the nature of the case, and forming an opinion upon it himself, to report it to the Inner House for their final decision. That act in its fourth section provided "that it shall not be competent either by "reclaiming petition or appeal to the House of Lords "to question any interlocutor granting or refusing such "trial by jury;" leaving it to the Court of Session finally to decide upon the question, whether the cause should be tried by a jury or not.

The act of 59 Geo. 3. c. 35. altered this scheme in many important particulars: it directed that in certain descriptions of actions, which are enumerated, the Lord Ordinary should remit "the whole process "and productions forthwith to the jury court in civil "causes, which last-mentioned court is authorized and

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" required, according to rules and regulations whicl
" the said Court and the Court of Session are herein
" after empowered to make, to settle an issue or issues
" and to try the same by a jury, to be summoned
" and impannelled under the provisions now in force
" or herein-after enacted for that purpose."

The second section directed, that if questions o law or relevancy arose, the Lord Ordinary was t dispose of them, and then to remit the cause to th jury court; and there is this provision: " that the inter " locutor of the Lord Ordinary ordering the caus " to be remitted to the jury court, whether with o " without reservation of the alleged question of law " shall not be subject to review by representation " petition, appeal to the House of Lords, or otherwise." That related to those actions which were enumerated.

The fourth section related to all other cases. In all other cases where matters of fact were to be proved the Lord Ordinary was authorized to remit the whole process to the jury court and to direct the matter to be tried, the jury court being to settle the issues.

Then the sixth section gave the Court of Sessio a similar power to direct issues, and the fifteenth sectio contained this provision: " that it shall not be com " petent by representation, reclaiming petition, bill o " advocation, appeal to the House of Lords, or other " wise to bring under review any interlocutor by " the said Divisions, Lords Ordinary, or Judge of the " Admiralty ordering a trial by jury." Now, my Lords, there can be no ambiguity or doubt upon these enactments.

Then comes what has been thought to be very

important in the previous part of the suit. The Lord Ordinary having remitted the whole cause to the jury court to settle the issues and proceed to trial, there is this provision: "that it shall be competent and "lawful for the jury court, when it appears to the "said Court in the course of settling an issue or issues, "or at any time before trial, in the cases remitted to "them as aforesaid, that there is a question or ques- "tions of law or relevancy which ought to be "previously decided, to remit back the whole process "and productions to the Division of the Court of "Session, the Lord Ordinary, or Judge Admiral who "remitted the same to the jury court, that the question "or questions of law or relevancy may be considered "and determined there." Then comes this provision in the same clause, which also is relied upon: "and "it shall be competent for the jury court, when it "appears to the said Court in the course of settling "an issue or issues that a case turns upon matters "of complicated accounts, or other matters to which "trial by jury is not beneficially applicable, to remit "back the whole process and productions as aforesaid "with their report thereon, in order that the Division, "Lord Ordinary, or Judge Admiral may proceed with "the same in such manner as shall appear to be most "expedient for the administration of justice." Now, this was to arise by an act of the Jury Court after the Jury Court had taken cognizance of the cause and had proceeded to settle the issues; a proceeding equally well adapted to the then state of the law of Scotland introducing a new system: not that the judges of the Court of Session should do this, but the Jury

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Court, who were familiar with the whole proce of the Court, and, therefore, much more com in investigating the nature of the case to d any difficulties in the particular case in hand prevented the beneficial effect of the trial by The act gave to that Court,—not to the Lord Or or the Court of Session,—but the Jury Court exe a jurisdiction under the act, a power to send i not to the Court of Session generally, but to th Ordinary or the Division of the Court of Session whom the cause had been fully investigated as objection which had occurred. If this course ha to be followed this question never could have ari

My Lords, other acts of parliament were afte passed. By the 6 Geo. 4. c. 120., (the fifteenth s it is thus provided: "that where the parties "about facts which require to be ascertained b "trial the Lord Ordinary shall have power to "the whole process to the Jury Court, or send pa "issues of fact to be tried, and the Jury Cou "settle the issues." But it contains this pa enactment: "the order of the Lord Ordinary, "far as it remits the cause, to be final." law stands as to any positive enactment res the order of the Lord Ordinary being final.

The object of the next statute was to get rid Jury Court as a distinct jurisdiction, and to un the Court of Session; and accordingly the act of 1 c. 69. contains this enactment: "That from a "such union all causes and issues, which if t "occurred after the passing of this act must "have been tried by jury in the Jury Court,

" tried by jury in the Court of Session, and such " causes shall be prepared for trial by the Lords " Ordinary respectively before whom such causes shall " be pending." That simply unites the Jury Court with the Court of Session, and does not profess to make any alteration in the scheme provided by the prior acts of parliament as to the mode in which the trials should take place. But it seems to be presumed that, because the Jury Court no longer exists as a separate jurisdiction, the positive enactments of prior statutes which made the decision of the Lord Ordinary final no longer exist, and that this question, whether a case should or not be tried by a jury, may by a circuitous mode become matter of litigation and appeal, just as if no such act had been passed.

My Lords, I find the scheme by which this has been attempted explained in Mr. Macfarlane's treatise on jury process; he states this in the fortieth page: " As a " remit with a view to trial is a most serious step " in consequence of its finality, the Court have " suggested that where the remit is objected to, the " Lord Ordinary should report the case." He undoubtedly had power so to do, but it was at his discretion whether he should do so or not; and by a previous decision it would appear that where a party is dissatisfied with a remit to the Jury Court, his course is to move to get the case retransmitted, for the purpose of having the question of law or relevancy on which he founds disposed of. " In this way the question of " law or relevancy,"—which your Lordships recollect is one of the excepted cases in the prior statutes in which it may be proper to have the opinion of the Court

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before it is sent to the jury court,—"In this w
"the question of law or relevancy is brought und
"discussion, and by section sixty-five of the A.
"11th July 1828, it is provided, that in all cases of
"transmission by the Jury Court to the Lord Ordina
"of the Court of Session, for the purpose of det
"mining any point of law or relevancy occurr
"previous to trial, the said Lord Ordinary shall rep
"to the Inner House all such matters, and that eit
"verbally or by cases, as to him shall seem expedie
"and in case of dilatory defences the Lord Ordin
"shall proceed as in the case of dilatory defences
"actions before the Court of Session. In all cas
"therefore, where a dilatory defence or plea of rel
"vancy or law arises, the course is obvious by whic
"the opinion of the Inner House can be obtained
"but the difficulty still remains where expedienc
"merely of a jury trial is questionable and no prope
"plea of law or relevancy has arisen. It is not to be
"supposed, however, that the Lord Ordinary will ever
"refuse, where the circumstances seem at all to require
"it, to give the parties an opportunity of going to
"the Inner House on the subject of a remit, either
"by reporting the case or pronouncing such findings
"as may be reclaimed against in the manner explained
"in the following section." Undoubtedly in a case which requires it, the Lord Ordinary would not perform his duty without doing that, and therefore it is not to be supposed he would take the course of declining to give the parties the opportunity of taking the opinion of such Court where the case required it. But the course adopted here makes it feasible in every case. The

Lord Ordinary says, this is a proper case to be tried by a jury; accordingly he sends it to the jury roll. That is not subject to appeal; it must stand therefore; the Lord Ordinary's direction that it shall be tried by a jury is not to be questioned. So the Inner House have decided in this very case; but in the very next step of the case an application is made to the Inner House to bring it back again, and that is granted; by which it must be taken to be assumed, not only that it is the matter of a reclaiming note to the Inner House, but of appeal to the House of Lords. It is an expedient, therefore, by which, if successful, the express intention of the legislature will be defeated, and the parties in all cases whose cases have been directed to be tried by a jury, will be coming continually to your Lordships bar. I am sure your Lordships will not be disposed,—and it is not now necessary to make any further observations upon the subject, —that your Lordships will not sanction a practice which will occasion such consequences as that. If your Lordships should be asked to sanction such a practice, it will then have to be considered, whether it is necessary to make a further legislative provision, if the circumstances in the Court below should appear to render it necessary. I make these observations without feeling it necessary to advert to any opinions which the Learned Judges in the Court below have expressed upon this subject, as both parties agree that this point had not been raised in the Court below, and it is therefore one entirely unaffected by the decision of this case; and if that point should arise again, I have no doubt that it will receive all the attention in the power of

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the Learned Judges. It will, however, be unnecessary for your Lordships to enter upon that if you shall agree with me that the facts of this case are such as ought to be tried by a jury.

The House of Lords ordered and adjudged, That the said interlocutor complained of in the said appeal be and the same is hereby reversed.

A. DOBIE—JOHN BROWNLEY, Solicitors.

[*25th April* 1839.]

(Appeal from the Court of Session, Scotland.) (No. 7.)

JAMES JOHN FRASER, Writer to the Signet, Appellant. —*Buchanan.*

JAMES CARNEGIE and others, Trustees of the late ALEXANDER STEVENS, Respondents.[1]—*John Stuart.*

Trust—Fraud.—A party executed a settlement in favour of certain trustees, who accepted and chose an agent to act for them: the agent in conjunction with one of the trustees, the husband of a cestui que trust, who was also heir at law of the truster, procured said cestui que trust to make up a title to part of the trust estate passing over the trust, and thereupon to execute a disposition in his favour, on the ground that it was in security of advances for the trust. The agent thereupon took infeftment, and executed a conveyance in favour of third parties: Held (affirming the decision of the Court of Session), that the agent was bound in the first instance, without awaiting the result of an accounting, to restore the estate in integrum against the real security created by the disposition and infeftment.

THE facts, as far as they relate to this appeal, are sufficiently detailed in the note by the Lord Ordinary and in the speech of the Lord Chancellor, but they will also be found at greater length in the next case.

2D DIVISION.

Lord Ordinary Moncreiff.

[1] 14 D., B., & M., 676. Fac. Coll. 8th March 1836.

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The respondents, as trustees of Mr. Stevens, brought an action of count and reckoning against the appellant for his intromission with his trust estate, in which the Lord Ordinary pronounced the following interlocutor, on the 20th January 1836:—"Sustains the "action, without prejudice to any question as to the "competency of the said John Stout and James Fyffe "resigning their office of trustees in any other matter "or discussion; and on the merits of the cause finds, "that from the nature of the transaction narrated "in the summons no reduction is necessary for "enabling the pursuers to maintain the conclusions "thereof: Finds, that the defender, being in the full "knowledge of the trust deed executed by the deceased "Alexander Stevens, and of the acceptance and actual "operation of that trust under which he admits "himself to have been the acting agent, was in malâ "fide to create or to accept of the bond and disposition "in security libelled on, whereby Mrs. Jean Stevens "or Fyffe, by her title completed as heir at law "of the said Alexander Stevens, disponed a valuable "part of the trust estate to the defender in security "of an assumed debt of 2,500*l.*, said to be contracted "by James Fyffe her husband, who, though named a "trustee, was expressly excluded from all personal "interest in the trust estate, and by three of the "children of the said James Fyffe; suppressing alto-"gether the said trust, and the rights and interests "thereby created: Finds, that the said defender farther "acted in malâ fide, in so far as he did take infeftment "on the said disposition and thereafter assign the "same to third parties for valuable considerations, "not disclosing to such third parties the existence

"and operation of the said trust: Finds, that whether "the debt acknowledged by the bond was a just debt "for money actually advanced to the parties therein "mentioned or not, and whatever may be the just "state of accounts between the defender and the "pursuers on the said trust estate, the defender is "bound in the first instance, and without waiting "the adjustment of any such accounts, to restore "the estate in integrum against the real security "created by the said disposition and the infeftment "thereon, as now standing in the third parties his "assignees.

"*Note.*—The Lord Ordinary is convinced that very "little is necessary to be said in explanation of the "above interlocutor. On the merits of the cause the "only difficulty is to imagine how it should be defended "at all.

"The short state of the case is this: Stevens the "brother of Mrs. Fyffe executed a settlement, by which "he conveyed his whole property, heritable and "moveable, to the trustees named: the trust was "expressly accepted. By the terms of it, there was "first a liferent to the testator's widow, and then "a liferent to Mrs. Fyffe, and on her death a "fee to her children, who were eleven in number "at the date of the disposition in security; and the "jus mariti of Mr. Fyffe (he being bankrupt) was "excluded. In this state of things, after the death "of the widow and another trustee, Mr. Fyffe, being "the only trustee resident in Scotland, employed the "defender, as he himself says, as agent in the trust; "and it is too clear that the very least of the case "is, that schemes were formed for making the trust

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" estate available to Fyffe himself, or to the defender " and others advancing money to him, to the prejudice " of the wife's liferent and the ultimate purposes " of the trust in the disposal of the reversion. Finding " that this could not be done directly, the defender " devised the plan of making a title in the person " of Mrs. Fyffe as heir at law, in which of course " the trust was not mentioned. The pursuers do " not complain of this, because it was in itself useful, " and should have been followed by a disposition " by her to the trustees; but instead of this the " defender immediately took the bond and disposition " in security for a debt stated simply as the personal " debt of Fyffe himself and three out of his eleven " children (even the wife disponer not being stated " as a debtor at all), and then having taken infeftment " assigned the security to certain creditors of his own, " concealing the existence of the trust. How this can " be attempted to be justified the Lord Ordinary " cannot conceive. The defender says that he had " made advances for the better aliment and for the " education and outfit of the family, and that there " was a power to the trustees in the trust deed to " sell or uplift part of the estate for the latter purposes. " But was this transaction anything like an execution " of such a power? The Lord Ordinary is constrained, " however unwillingly, to think that it was, on the " contrary, a very deliberate proceeding for defeating " the trust, and creating a security by covert con- " trivance which could not have been created even " by the surviving trustees concurring in any direct " trust act. But it was known that that could not be " even attempted.

"What may have been the state of the defender's "advances to Mr. Fyffe or for the family does not "appear to the Lord Ordinary to be very material, or "indeed at all material, to the chief point involved "in this action. The defender's statements on this "subject are denied by the pursuers, who state, on "very probable grounds derived from documents in "process, that the security was truly meant to be given "for money to be advanced, and which never was "advanced. But supposing it were otherwise, and that "the pressure of such a state of advance was the "stimulus which led to the extraordinary measure "adopted, would that at all justify it, or afford any "answer to the demand of the trustees that matters "shall be restored to the state in which they ought "to have been, whatever other questions may remain?

"The Lord Ordinary had some difficulty as to the "correctness of the proceeding without John Stout "concurring in the action; but,

"1. There is no plea on the title, or on that as a "defect in the form.

"2. The defender could not plead such a point, be- "cause his own case requires that he should say that "Stout had ceased to be an acting trustee long before "his resignation.

"3. The action is by a full quorum of three trustees. "Mr. Fyffe is necessarily called as a defender, and the "defender Mr. Fraser has by his pleadings in the "record rendered it impossible to discuss any question "as to the competency of Stout's resignation or the "necessity of his being a party. The last plea in law "refers to Mr. Fyffe alone.

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Judgment of Court, 8th Mar. 1836.

"If the defender reclaims the bond and disposition "ought to be printed."

The appellant reclaimed to their Lordships of the Second Division, who pronounced the following interlocutor, on the 8th March 1836.—"Adhere to the interlocutor complained of; refuse the desire of the note "find additional expenses due; allow the account o "expenses to be given in, and remit to the auditor "to tax and report. Farther, the Lords having con "sidered the special circumstances of this cause, they "before further answer, appoint the proceedings t "be laid before the Keeper of His Majesty's Signe "and the Commissioners, in order to report to the "Court their opinion thereon with reference to the "professional conduct of the defender, and that with "their earliest convenience."

Against these interlocutors Mr. Fraser appealed.

Appellant's Argument.

Appellant.—This action, as laid, cannot be maintained, inasmuch as the documents which have been founded on as instructing a title to pursue confer no such power. The appellant is called to account at the instance of certain individuals styling themselves trustees of the late Alexander Stevens, architect in Edinburgh; whereas these persons neither were originally appointed trustees nor have they by any lawful instrument been properly assumed into the trust.

Neither can this action be maintained, inasmuch as it is altogether "a fraudulent and collusive device "between the present pursuers and Fyffe with a view "of defrauding the defender of large sums of money

"bonâ fide advanced." Moreover, it is not "main-"tainable as laid, Fyffe never having been effectually "excluded from the trust."

The Lord Ordinary has found that the action is brought by a full quorum of trustees; but, with all deference, even if a quorum have power to sue alone, which the appellant by no means admits, unless possibly after an application to and refusal by the other trustees to join in the action, it is clear that they ought to have designed themselves as a quorum in the summons, which they have not done.

By the original deed power is given to assume new trustees, "to be joined with themselves in the "management of the affairs committed to their care "by this deed." The warrant, therefore, which Stout and Fyffe had for nominating new trustees did not empower them to resign the trust, but, on the contrary, expressly recognizes their continuance in office; otherwise it would not have declared that the new trustees should be joined with the old trustees in the management. It is one thing to have a power to appoint persons to act along with other individuals, but it is another thing to have a power to appoint persons to act in place of other individuals.

Mr. James Fyffe and his wife were entitled to create an heritable burden in security of such advances; and inasmuch as the trust deed expressly declares, that "the purchasers shall be noways concerned with the "application of the price," the appellant has no concern whatsoever with the manner in which the monies so received were disposed of.

It is said that the appellant as agent, being cognizant of the trust, ought not to have made the advances,

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Appellant's Argument.

and if he did so it must be at his own risk. This proposition, with great deference, is not a correct one. The appellant admits that he was agent under the trust as it then existed; that is to say, he was the agent of Mr. James Fyffe, who gave himself out and was considered to be the only acting trustee under Stevens's settlement; and the appellant dealt with Fyffe as a party having full power to deal with the trust estate, and upon that supposition made the advances in question.

The law of Scotland does not, like the Courts of Equity in England, recognize any incapacity in a law agent to deal with his clients; he is as capable of buying from and selling to them as any other person; but even the English Court of Chancery would support such a transaction as the present.[1]

Without hearing the counsel for the respondents the Lord Chancellor immediately proceeded as follows:—

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, of all the clear cases which have ever come under my consideration this is the clearest, and admits of the least doubt; in fact it would be scandal to the law of Scotland if it did admit of doubt. Two courts in Scotland have already decided against the appellant, and in those decisions I do most cordially concur. It has been said that the case ought to be sent to a jury, but the mere statement of the facts would in any civilized country entitle the plaintiffs below to a decree. In opposition to the inter-

[1] Williams v. Piggott, 1 Jacob, 598; Pitcher v. Rigby, 9 Price, 79; Montesquieu v. Sandys, 18 Vesey, 302; see Gibson v. Jeyes, 6 Vesey, 266; Wood v. Downes, 18 Vesey, 120; Sugden's V. & P. chap. xiv. sec. 2; Gordon v. Trotter, 11th July 1833, 11 S. D. & B. p. 696.

locutors of the Courts below it has been said, that they would injuriously affect the character of the appellant. Well, if they do, how can that be helped? This injurious effect is the necessary consequence of those acts in which he is concerned.

The following are the circumstances of the case to which in particular, my Lords, I would direct your attention. A trust deed was executed by Mr. Stevens to provide for the support of his wife in case she should survive him, and after her death to provide for her children. This deed, after providing for certain contingencies, then proceeds in these terms:—"In the fourth "place, after the decease of the said Margaret Stout "my wife, and failing children of my body then existing, my said trustees, or survivors or survivor, and "foresaids shall apply the free annual produce of my "heritable and moveable estate to the aliment, maintenance, and support of Jean Stevens, spouse of the "said James Fyffe, my sister, and the aliment and "education of her children of the present or any other "subsequent marriage, in such way and manner as "shall appear to my said trustees best suited to the "comfort and advantage of her and her family. Declaring always," (and this, my Lords, deserves particular attention,) "as it is hereby specially provided "and declared, that the said James Fyffe during the "subsistence of the marriage between him and the "said Jean Stevens, or any other husband she may "marry in case of the death of the said James Fyffe, "shall have no concern with the rents and annual "proceeds of my means and effects, heritable and "moveable, in virtue of his jus mariti, courtesy of Scotland, or any other title whatsoever, and that the

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" same shall neither be liable to their deeds nor sub-
" jected to the legal diligence of the creditors of the
" said James Fyffe, or any future husband of the said
" Jean Stevens. In the fifth place, after the decease
" of the said Jean Stevens my sister, my said trustees
" shall convert my whole subjects and effects into cash,
" and divide the free proceeds thereof equally amongst
" the children procreate or to be procreated of the
" body of the said Jean Stevens of her present or any
" subsequent marriage, equally betwixt them share
" and share alike; whom failing before majority or
" marriage, my said trustees shall make over the whole
" residue of my means and effects to my own nearest
" heirs or assignees whatsoever. And it is hereby
" specially provided and declared, that my said trustees,
" and survivors or survivor of them, and foresaids, shall
" have full power and liberty, in the event of my
" leaving no children of my own body, to sell any part
" of my heritable subjects, or uplift any debts due to
" me for the purpose of fitting out any of the said Jean
" Stevens's children in life, putting them to appren-
" ticeships, or such like, or laying out the same in any
" other way advantageous to her family; on this con-
" dition always, that the said Margaret Stout's consent
" be previously had thereto, and she fully and com-
" pletely satisfied and secured as to her liferent of the
" sums so uplifted and applied in manner aforesaid."

He then empowers the trustees to sell and dispose of any part of the property. He then gives powers to the trustees, " and the survivors or the survivor of them, if
" they think proper, to assume any person or persons to
" be joined with themselves in the management of the
" affairs committed to their care by this deed, declaring

"that such trustees so to be assumed shall have the "same powers and privileges vested in them as are "hereby vested in my said trustees before named."

Under these circumstances two trustees died: one of the surviving trustees lived in England; the other, Captain Fyffe, was living in Scotland. Unfortunately the management of the property fell to this individual, who by the trust seems to have been in some degree excluded from the management, and who does not appear to have been very fit for the office. It appears that when this management devolved on him he was labouring under difficulties, in fact that he was greatly involved in debt. In these circumstances Mr. Fraser the appellant became concerned as law agent in the arrangement of the trust affairs: so far there is no dispute. It appears that soon after this, a negociation was commenced to sell part of the property; this failed. An endeavour was next made to raise some money on it by way of pledge or mortgage; this also failed. It appears, however, that at a subsequent period the security was executed under which the present appellant claims. By the bond executed by James Fyffe and three of the children, the appellant had the personal security of those parties, at all events, for the repayment of the advances which he had made. Not content with this, however, he takes also from Mrs. Fyffe a disposition in further security of part of the property as heiress at law to her brother, and without taking any notice of the deed of trust. This is not only important to be considered, but it goes to the substance of this case. Now, it is submitted by the appellant that that is not proved; why, it is the case that is proved, from beginning to end. Then it is said that it is no objection, because it is

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not unusual where money has been previously advanced for the support of the family to sell a part of the estate for that purpose. That may be often done as to part, where the parties for whose behoof the advances are made have such an interest as will entitle them to dispose of a part, but it goes to the very substance of the present case that these children had only an expectancy. The provision is not for the children of Mrs. Fyffe only by her then husband, but the children she might have by any other husband. If there was an expectancy in the children, and if they had thought proper to bind their expectancy, it is unnecessary to consider what might have been the effect of such a transaction. But it turns out that the deed proceeded on a false recital, that the money was not advanced for three of the children, but for the support of the whole family. Even taking it, according to that which is stated in justification of this transaction, not to have been money advanced, as the deed itself imports, but that the money had been advanced for the support of the family generally, it would have been an advance which the trustees would not be entitled under the trust deed to dispose of the estate to repay, because the trust is only to apply the year's income as it arose for the maintenance of the family. If, therefore, this insolvent husband had advanced money, or Mr. Fraser had advanced money, for the support of the family, there would be no ground for charging on the corpus of the estate any accumulated amount of money so advanced; the trust prohibited that, and the parties, the cestuique trusts, would not be liable; and the importance of this false recital is obvious, for if the fact had been correctly recited according to the now representation of the appel-

lant, it would have constituted no debt, and, therefore, no consideration for such a charge.

The security bears date the 1st of May 1830, and there is a letter dated the 24th of June, which I see is in the certified copy of the proceedings, and, therefore, must have been before the Court below. Now, that letter shows the connexion between that professional person and his client:—

LETTER from Captain JAMES FYFFE to JAMES JOHN FRASER, W. S., then residing in London.

"Dear Sir, Edinburgh, 24th June 1830.

"At a conference a few days previous to your "leaving Edinburgh, at which were present yourself, "Mrs. Fyffe, and myself, you intimated to us that on "the following Monday your clerk would give "Mrs. Fyffe or myself the sum then immediately "required, and that I might intimate to remaining "creditors that on the 20th May last you would pay "them off. Confiding, therefore, as I conceived I had "every right to do, in your promise so given, I gave "the intimation, and Mr. Jamieson was applied to "on Monday, who said he had no money then, but to "call in a day or two, and he would have funds. "After being repeatedly applied to, he ultimately "several weeks since, declared that he had no money, "and as frequently said that day after day you were to "be in Edinburgh. I am, therefore, from the peculiar "circumstances under which I am placed, again re- "quired to address you in the matter. You were, when "you intimated as above to me, perfectly aware of the "difficulties under which I labour, and which have "been very considerably increased by your withhold-

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" ing the pecuniary aid promised by you at the two " distinct periods as aforesaid, even to my incarcera- " tion by one creditor, who, with others, considered " that a noncompliance with a settlement on the 20th " of May was mere fiction on my part towards them. " I feel all this the more grievous, as you know that I " have done every thing you required on my part. I " am loath to attribute blame in the matter, for per- " haps it may be ascribed to negligence in some other " quarter; but how is it that you did not make any " reply to a letter which I gave Mr. Jamieson to for- " ward to you, which you surely must have received?"

It then goes on to state matters of debt, and then Mr. Fraser's answer, on the 29th June 1830, says: " The person who was to advance the money did not " deem the security sufficient; I have not been able to " get it elsewhere, but I am in daily expectation of it. " I will be in Edinburgh in the course of eight days, " when I hope to get matters arranged to your satis- " faction." Now, taking the security, that letter, and the answer to it, I think there is no great difficulty in forming a satisfactory conclusion as to the nature of the transaction between these parties.

It is said that Mr. Fraser had no notice or might be supposed to be ignorant of Mr. Stout being a trustee; it does not appear to me to be very material, in the course ultimately adopted, whether that was so represented or not, because he did not take the security from Mr. Fyffe as trustee; if he had, there was no power in Mr. Fyffe to execute any such charge on the estate. What he pretended to take was a security from a married woman and from the three children. Now, to say that a party having a trust deed in his possession,

appointing two persons as trustees, is to make a title against the cestuique trusts, because he did not know that one of the trustees had accepted the trust, is absurd, and it is impossible there can be any law or any rule in Scotland which can so affect the rights of parties in Scotland or in any civilized country. The party sees on the deed who are the trustees. If he deals with one without inquiring about the other, he must necessarily be liable to all the consequences that may result from the other being a trustee. If he chooses to assume that he is dead, or that he never was known, or if he chooses to believe Captain Fyffe without inquiry, it is impossible that that circumstance can be taken in his favour. That, however, is not the nature of the transaction: the transaction is a security taken from the wife and children,—the wife who is anxious to protect her husband against his debts, and the children who derive no benefit from the money transaction between Mr. Fraser and the father. Then we have Captain Fyffe in his character of trustee abusing his trust, committing a gross breach of trust, endeavouring to deprive his wife and family of a benefit the settlor intended they should have, and we have Mr. Fraser, either for the accommodation of his client Captain Fyffe, or for his convenience, or for some consideration that might have passed between himself and Captain Fyffe, making himself a party to that transaction, and now claiming against the wife and against the cestuique trusts a title to the property which was the subject of that trust.

Having got this property, he thought the safest way was not to take it to himself, and passing over the trustees of whom he had most distinct knowledge, he

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makes up a title in order to extend the fraud to some third party; and therefore making up a title in Mrs. Fyffe as heiress to the settlor, he succeeds probably in representing to some third party advancing the money, that there is a clear title, and of course of the trust deed the party advancing the money had no information. However that may be, an interest is created in a third party, but the cestuique trusts, those who are attempted to be so defrauded, apply and ask for relief; and the relief they ask, so far as it is considered by the interlocutor pronounced, is, that those who have been parties to this transaction may do what is here prayed, in order to restore them to the situation in which they were previously; because it is only the second and third heads of relief to which the interlocutor pronounced applies. The first is not touched; that is left for further consideration. The first is: "That "James John Fraser, defender, ought and should be "decerned and ordained by the decree of the Lords of "our Council and Session to exhibit and produce "before our said Lords a full and particular account "of his whole actings in regard to the property of the "said trust estate, and to hold just count and reck-"oning with the pursuers as trustees foresaid for the "same." That is reserved, and the interlocutor does not touch that.

The next the interlocutor does touch, and it gives the relief prayed: "The said defender ought and should "be decerned and ordained by decree foresaid to "reconvey, renounce, and give up the title created "in his favour by the bond and disposition in security "before mentioned, so far as he himself has still any "interest therein, and also to free and relieve the said

"heritable property in Charlotte Street as aforesaid "of the burdens constituted over the same by means "of the title fraudulently made up as before stated "in the person of the said Mrs. Jean Stevens or Fyffe, "by discharging and paying off the debts contracted "on the faith of that title, and by getting the said "heritable securities extinguished, and to make pay- "ment to the pursuers as trustees aforesaid of the "rents of the property over which the said security "was fraudulently created since the date of the said "bond and disposition in security. And in the event "of the said James John Fraser failing so to do, then "and in that case the said James John Fraser and "the said James Fyffe ought and should be decerned "and ordained by decree foresaid jointly and severally, "one or other of them, to make payment to the "pursuers, as trustees foresaid, of the sum of 2,500*l.* "sterling as the loss or damage which the trust estate "has sustained through the title fraudulently made "up as aforesaid in the person of the said Mrs. Jean "Stevens or Fyffe, and the burdens thereby con- "stituted in favour of third parties over the said "heritable property, with legal interest of said sum "from and since the date of said title till paid."

Now, the substance of that is this;—here has been a charge fraudulently created on this property, you have been instrumental in creating it, having been the instrument by which a fraud has been committed, you are in the first place decreed to relieve the estate from that burden; if you fail in doing that, whether there is a title existing in a third person which you cannot get rid of, or not, if you fail to restore the cestuique

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trusts to the place in which they ought to be if the fraud had not been committed, you are decreed liable to repay the trust that loss which it sustained by the breach of trust. It is so as against Captain Fyffe the trustee and the professional person who takes a benefit from the trustee. Now, that is according to the ordinary course of proceeding in this country, and there is nothing suggested to show that that most wholesome rule of indemnifying cestuique trusts against any fraud committed by their trustees is not consistent with the law of Scotland, or that it is excepted from the act for the trial by jury. It is compensation for a breach of trust, which in the first instance is directed to be set right by a restoration of the property itself to the party; not by way of damages, but by returning that property which the law will assume to be in their hands, and whether it be money which ought to be in their hands or not, the Court will consider it in their hands, and administer it therefore subject to the provisions of the trust deed.

My Lords, the fourth head is also not touched by the interlocutor, which is, that the defender ought to be decreed to make payment to the pursuers of the expenses; that forms no part of the interlocutor. The first remains untouched; the substantial relief is as expressed in the interlocutor of the Lord Ordinary on the second and third heads. Then the interlocutor being pronounced, and this being carried into the Inner House, there was added to this interlocutor of the Lord Ordinary a reference to the proper authorities there, to consider the conduct of Mr. Fraser in his professional character. It is quite immateri

and unnecessary to consider whether that could be the subject of appeal, because I feel quite satisfied, if your Lordships by appeal have jurisdiction to entertain the merits of Mr. Fraser in his professional character, that acting for a trustee he was acting for the cestuique trusts. He had a duty to perform, not for Mr. Fyffe for whom he was acting, but for Mrs. Fyffe and the children of that family. That duty he grossly violated, and I think it was an extremely proper course to pursue, to refer it to the proper authorities to consider what course under those circumstances ought to be adopted with respect to him; therefore it is quite unnecessary to consider how far the Court should have jurisdiction. If your Lordships should be of opinion that the Court had jurisdiction, then they most properly exercised it.

Another objection in point of form was, that the present pursuers have no character in which to sue, because they are not properly constituted trustees. My Lords, the trust deed authorizes the trustees to appoint other trustees, who are to have the same power which they had themselves. Now, the argument is, that although there was a power to appoint new trustees to join with the existing trustees, there was no power in the old trustees to retire. Now, whether that be so or not, the record is thus framed: the record is by the trustees appointed, and about the validity of their appointment there can be no question. If there was no power in Mr. Stout to retire from the trust, then Mr. Stout remains a trustee with them; if, on the other hand, Mr. Stout had power to retire from the trust, then the present pursuers are the sole trustees.

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But supposing Mr. Stout had no power, the result w have been that the present pursuers, with Mr. St will constitute the trustees. The present pursuers also the major part of the trustees and competent th fore to sue, and Mr. Stout, if a trustee at all, is a tru out of the jurisdiction of the Court residing in Engl and has so little to do with the trust that the founda of the appellant's case is that he is no trustee at It would be strange indeed if that argument sh prevail, but it is quite consistent with the fact Mr. Stout being a trustee manifestly out of the ju diction, for the Court to entertain jurisdiction on application of those who clearly are trustees, whe with Mr. Stout or not, is a matter immaterial for present purpose.

My Lords, it does not appear to me that ther a shadow of doubt on the propriety of the deci which has been come to by the Court below, an would be most lamentable if it were otherwise accord to the admitted facts. I am not adverting to any do ful facts; I am adverting to written documents, w show what the history of this transaction was. I sufficient for your Lordships to come to a decis that this instrument ought not to exist or to have validity against the cestuique trusts, that is, aga the wife and children of this family, and that those were instrumental in creating this burthen on property of the cestuique trusts should be direc to restore the property so injured by them eit in specie or by compensation to the amount ra by them. That is in fact the whole case we have adjudicate on, and if your Lordships agree with

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in the opinions I have submitted to your consideration, the course I propose to your Lordships will be, to affirm the interlocutor of the Court below, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this house, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

T. C. KER—ROBERT SCOTT, Solicitors.

[*29th April* 1839.]

(Appeal from Court of Session, Scotland.)

(No. 8.) Mrs. BARBARA STUART or HERRIOT, Widow, and others, Trustees of the late ROBERT HERRIOT, Appellants.—*Buchanan.*

JAMES CARNEGIE and others, the only acting Trustees of the late ALEXANDER STEVENS, and H. M. GIBB and others[1], Respondents.—*John Stuart.*

Inhibition—Arrestment.—Circumstances in which (affirming the judgment of the Court of Session) inhibitions and arrestments used against trust estates were simpliciter recalled.

2D DIVISION.
Lord Ordinary Moncreiff.

THE late Mr. Alexander Stevens, on occasion of his sister's marriage with Mr. James Fyffe, and being party to their marriage contract, conveyed to them in conjunct fee and liferent for the husband's liferent use certain heritable subjects in the town of Ayr; and by subsequent conveyance on the 31st March 1796, he conveyed to the same parties other heritable subjects the town of Leith in the same terms.

Mr. Stevens, who had no family of his own, previously to his death in the year 1825, executed a trust settlement, whereby he conveyed his whole real and personal property to his wife Margaret Stout, her brother John Stout, merchant in Lancaster, James

[1] 14 D., B., & M., 670.

Fyffe, and John Rhind, writer in Edinburgh, and the survivors or survivor of them accepting, any two to be a quorum while two are in life, to be held for the uses and purposes declared by the deed, which were, in the first place, the payment of the truster's debts; secondly, to apply the free annual proceeds of the property for behoof of his wife during her life.

After the wife's death, and on failure of children of the marriage then existing, the trustees were directed "to apply the free annual produce of my heritable "and moveable estate to the aliment, maintenance, and "support of Jean Stevens, spouse of the said James "Fyffe, my sister, and the aliment and education of "her children of the present or any subsequent "marriage, in such way and manner as shall appear "to my said trustees best suited to the comfort and "advantage of her and her family." The legal rights of the husband in virtue of his jus mariti or otherwise in the rents and annual proceeds of the property were excluded.

The deed also declared, that "after the decease of "the said Jean Stevens, my sister, my said trustees "shall convert my whole subjects and effects into cash, "and divide the free proceeds thereof equally amongst "the children procreate or to be procreated of the "body of the said Jean Stevens of her present or any "subsequent marriage, equally betwixt them, share and "share alike; whom failing before majority or mar-"riage, my said trustees shall make over the whole "residue of my means and effects to my own nearest "heirs or assignees whatsoever. And it is hereby "specially provided and declared, that my said trus-

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" tees, and survivors or survivor of them, and fore-
" saids, shall have full power and liberty, in the event
" of my leaving no children of my own body, to sell
" any part of my heritable subjects or uplift any debts
" due to me for the purpose of fitting out any of the
" said Jean Stevens's children in life, putting them to
" apprenticeships, or such like, or laying out the same
" in any other way advantageous to her family;
" on this condition always, that the said Margaret
" Stout's consent be previously had thereto, and she
" fully and completely satisfied and secured as to her
" liferent of the sums so uplifted and applied in man-
" ner foresaid." The deed farther contains powers of sale generally of the heritable subjects, authority to name factors for collecting the rents, and various other powers and clauses.

Mr. Stevens died in 1825 without issue, and Mr. Rhind and Mrs. Stevens both died in 1826.

On Mr. Stevens's death, in May 1825, Mr. Stout came from England to attend the funeral, and on the occasion signed, along with Mr. Rhind and Mr. Fyffe, minute containing a pro formâ acceptance of the trust by them.

Mr. Fyffe had a brother John Fyffe, a Baron of the Austrian Empire, who resided in Vienna, but was possessed of considerable property in houses situated Edinburgh. He died in 1826, leaving a last will and disposition and settlement, by which he named certain persons as his executors; and among other bequests made the following in favour of Mr. Fyffe:—" I here-
" give, grant, bequeath, and dispone to my brother
" Captain James Fyffe, his wife Jane Fyffe, and cl-

"dren, two third parts of all my houses, shops, and "tenements lying in Union Place, Picardy Place, "Broughton Place, and Drummond Street."

In 1827 Mr. Fraser became agent under Mr. Stevens's trust, and continued to act until the year 1830, during the whole of which period Mr. Fyffe was the sole acting trustee under the trust; and Mr. Fraser made advances to Mr. Fyffe to the amount of 4,600*l.* besides accounts incurred for business done to the amount of near 400*l.*

No title to the property was ever made up in the person of the trustees, and Mr. Fraser having agreed to advance certain sums to Mr. Fyffe obtained from him the absolute conveyance of a house in Charlotte Square, Edinburgh, part of the trust estate of which Mr. Stevens had died seised. The conveyance contained an acknowledgment from Mr. Fyffe of the receipt of 2,500*l.*, but as this sum was not in fact paid, but was intended to pay debts of Mr. Fyffe at that time unascertained, Mr. Fraser granted to Mr. Fyffe a letter in the following terms:—"You have this "day granted me a receipt for 2,500*l.*, being price of "house No. 1, Charlotte Square, sold to me by you as "sole trustee of the late Alexander Stevens; and I "oblige myself, in the event of its turning out, upon "the examination of the cash account of Mr. Stevens's "trust estate, that the amount of cash advances to you "as trustee as aforesaid does not amount to 2,500*l.*, to "pay you the difference."

On the 1st May 1830 Mrs. Fyffe, under the advice of Mr. Fraser, executed in his favour, with consent of her husband, a bond and disposition in security for the sum of 2,500*l.* over the house in Charlotte Square as

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sister and heir of the late Mr. Stevens; and the position bears as its consideration that the said J Fyffe and three of his children had "instantly "rowed and received from James John Fraser the "of 2,500*l.*" The personal obligation in the was undertaken by these four persons in addition t heritable security granted by Mr. and Mrs.] Mr. Fraser immediately took out from the supe the magistrates of Edinburgh, a precept of clare cc in favour of Mrs. Fyffe as heir at law of her brc upon which infeftment followed on the 23d 1830.

In November 1830 Mr. Fraser having obtaine advance of 2,500*l.* from the late Mr. Robert He the husband of the appellant, assigned and conv over to him by a regular deed of assignment the of 2,500*l.* being a part of the debt due to hin Mr. Fyffe.

Differences having arisen between Mr. Fraser Mr. Fyffe, and Mr. Herriot having demanded pay of the debt contained in the assignation to him, payment having been refused, Mr. Herriot brougl action before the Court of Session for the purpc obtaining payment, but before any progress had made in that action he died, leaving a trust deed u which the appellants were appointed his trustees.

In these circumstances an agreement was ent into between Mr. Fraser and the appellants, by w there was the following arrangement as to the proc ings already instituted: "and it is also agreed, that "proceedings for recovery of debts due to Mr. Fr "and assigned by him to Mr. Herriot, and for wl "suits have been commenced, shall be carried or

"Mr. Fraser in the name of Mr. Herriot's trustees, he "relieving them of the expenses."

In pursuance of this agreement Mr. Fraser, who had acted as the late Mr. Herriot's agent, continued to take charge of that action, and had the conduct and superintendence of the proceedings under it, though these were carried on in the name of the late Mr. Herriot's trustees.

During the dependence of this action the appellants applied for and executed against the defenders in the action the diligence of inhibition, by which they were legally prohibited from selling, alienating, or in any way disposing of any of the heritable subjects comprehended under the settlements of Mr. Stevens or Baron Fyffe to the prejudice of the appellants or of the debts sued for. They also obtained the diligence of arrestment, which was duly executed against the tenants of these different subjects, by which the rents payable by them were legally attached till the issue of the action.

The trust deed conferred no power on the trustees of resigning, but by it an authority is given to the "trus- "tees and the survivors or survivor of them, if they "think proper, to assume any person or persons to be "joined with themselves in the management of the "affairs committed to their care by this deed;" and under this clause Captain Fyffe and Mr. Stout assumed, as sole trustees, Mr. James Carnegie, a clerk in the Commercial Bank, and two persons of the names of Richardson and Anderson, writers in Edinburgh, and upon them they devolved the whole trust powers, rights, and duties. They then resigned their own offices as trustees.

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The cause proceeded (Mr. Stout having been call by a supplementary summons), and a record bei prepared and closed, the following interlocutor was p nounced by the Lord Ordinary, "20th January 1836. "The Lord Ordinary having considered the clo "record, and heard parties procurators thereon, a "made avizandum, finds it admitted that the p "suers, Herriot's trustees, can only maintain this acti "as in the right of James John Fraser, from wh "they derive right by assignation, and subject to "pleas and defences competent against him: Fin "that the defender John Stout, called by the supp "mentary summons, having accepted of the trust un "the deed of Alexander Stevens and acted there "must be considered as having been still a trus "during the whole period within which the debt "advances of money is stated to have been contract "to the said James John Fraser: Finds, that by t "terms of the trust deed, in the event which occurr "the whole 'annual produce' of the trust estate w "applicable 'to the aliment, maintenance, and su "'port of Jean Stevens, spouse of the said Jam "'Fyffe, my sister, and the aliment and education "'her children of the present or any subsequent m "'riage, in such way and manner as shall appear "'my said trustees best suited to the comfort a "'advantage of her and her family,' with an expr "exclusion of the jus mariti of her husband, and of "right in him or his creditors to interfere with "'rents or annual proceeds' thereof: Finds, that "so far as advances might be made by the said Jam "John Fraser to the extent of the rents or annu "proceeds which were applied to the aliment of

"said Jean Stevens, or the aliment or education of her "children, such advances might become just and law- "ful debts exigible from the said trustees, and effectual "against the alimentary fund under their management "in each year. But finds, that it was not competent "to the trustees, or a quorum of them, except in virtue "of the special power conferred on them and by a "regular trust act in conformity thereto, and altogether "incompetent to one trustee acting by himself, to "pledge either the fee or reversion of the said trust "estate or the future annual rents thereof for advances "made generally on the order of the said James Fyffe, "or of others of the family, in whatever manner the "same might be applied, without prejudice always to "the personal liability of the parties giving such "orders or receiving such advances; and that no "third party cognizant of the terms of the trust can "be held to have made any such advances on the faith "of the trust estate except to the extent above ex- "pressed: Finds, that the said trust deed contains a "special power to the trustees 'to sell any part of my "'heritable subjects or uplift any debts due to me for "'the purpose of fitting out any of the said Jean "'Stevens's children in life, putting them to appren- "'ticeships or such like, or laying out the same in any "'other way advantageous to her family,' on condition "of the consent of Margaret Stout, the testator's "widow, being obtained: Finds, that this power could "only be exercised by a regular act of a quorum of "the trustees, and to the effect and according to the "precise terms so expressed. And in respect that no "such act of the trustees was done or executed, and "that no such sale or uplifting did take place by

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" authority of the trustees, finds it unnecessary
" determine how far the power fell or subsisted af
" the death of Margaret Stout: Finds, that in so far
" the said James John Fraser may have made advan
" for making up titles to the trust estate, or in t
" necessary management of the trust, according to t
" terms and qualities thereof, such advances are j
" debts against the trustees and the trust estate its
" Therefore finds, that in so far as this action a
" supplementary action conclude against James Fy
" and John Stout as trustees of Alexander Stevens,
" is insisted in against the other trustees now sisted,
" cannot be maintained against them, or to the eff
" of adjudging the trust estate, except to the ext
" expressed in the previous findings: Finds, that in
" far as the summons concludes against Mrs. Fy
" personally, as proprietrix of an heritable estate,
" the purpose of attaching that estate, it was incumb
" on the pursuer to show by some act or deed lega
" effectual that the said Mrs. Fyffe did bind or plec
" her said separate estate for the payment of su
" debt: Finds, that the pursuers have not con
" scended on any such act or deed: and finds, th
" Mrs. Fyffe, as a married woman residing with h
" husband, cannot be made liable either in her per
" or in her separate estate for personal debts co
" tracted by her husband, whether for the support
" his family or for other purposes: but finds, that in
" far as any advances may have been made in t
" management or for the preservation of the subje
" belonging to Mrs. Fyffe in her own right, su
" advances will constitute a just debt against her a
" her said estate: Finds, that in so far as by the s

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"clements of Baron Fyffe there was any right and "nterest vested in the said James Fyffe in the estate "left by him, the pursuers are entitled to obtain "decree in this action against the said James Fyffe for "any debt or debts which shall appear to have been "legally contracted by him personally, and to the "effect of attaching such right or interest in the estate "of the said Baron Fyffe: but finds, that in so far as "the rights and interests in the estate of the said "Baron Fyffe are vested in the children of the said "James Fyffe, there is no competent conclusion in the "summons under which any judgment can be pro-"nounced to affect the said children, or their rights "and interests in the said estate; and with these "findings, before farther answer, excepting as after "expressed, remits to to examine "the accounts and vouchers referred to in the deed of "assignation as constituting the debt now sued for, "and to report whether or to what extent there was a "good and subsisting debt in the person of James "John Fraser comprehended in the said accounts in "conformity to the principles laid down in this "interlocutor, with power to him to call for all books "or writings necessary for explaining the transactions "to which the said accounts relate, and to call for and "receive all explanations from either of the parties," &c.

Judgment of Court, 8th March 1836.

To this judgment the Inner House, on disposing of a reclaiming note for the pursuers of the action, adhered on the 8th March 1836.

In the month of June following the respondents presented a summary petition, praying the Court "to "recal the said inhibition, loose and discharge the said "arrestments, and all other arrestments used at the

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"instance of the said trustees, in virtue of the said "letters of arrestment, in the hands of the persons "above named, or of any others in whose hands "they may have been used to affect sums belonging "to the petitioners, and that without caution or con- "signation; to prohibit and discharge the said trustees "or their agents from troubling or molesting any "of the persons in whose hands such arrestments may "have been used as aforesaid, and from using any new "inhibition or arrestment in virtue of said letters "of inhibition and arrestment or of any other upon "the dependence of said action; to grant warrant "to the keeper of the register of inhibitions to mark "the recal of the said inhibition in the record of "inhibitions; to find the said Mrs. Barbara Stuart "or Herriot liable in the expenses of this application, "proceedings to follow hereon, and of such other "expense as may be necessary to get the incumbrance "and nexus on the petitioners property and funds "by said inhibition and arrestments completely re- "moved, reserving to the petitioners any claim of "damages they may have against the said trustees "on account of the said diligence; or to do otherwise "in the premises as to your Lordships shall seem "proper."

A joint petition to the same effect was presented by the respondent Mr. Gibb, who was a creditor in respect of a bond of 1,954*l.*, and six of the children of Captain Fyffe, who had regularly assigned their interest to Mr. Gibb.

These petitions also prayed for an order of service both on the appellants and on Mr. Fraser, as being the original creditor in the debts, and the party truly

interested in the subsistence of the diligence; and accordingly the Court, on the 23d June 1836, made the following order:—"The Lords grant warrant for "serving this petition on the persons within named "and designed, and allow them to give in answers "thereto within eight days after service."

At the time when these petitions were presented Mr. Fraser was absent in London on business, and a note was put in to the Court in the name of Mr. Herriot as acting trustee and factor for the other appellants, stating the circumstances and craving time for giving in the answers.

When the case was advised by the Court, no answers had been put in for the appellants or for Mr. Fraser, and no appearance was made for the latter. In that situation the Court, on the 7th July 1836, pronounced the following ex parte judgment upon the petition for the respondents Carnegie and others:—"The Lords

Judgment of Court, 7th July 1836.

"having considered this petition, with the note for "Mrs. Barbara Stuart or Herriot, and other proceed-"ings, and heard counsel thereon, recal the inhibition "within mentioned so far as regards Captain James "Fyffe as a trustee; loose and discharge the arrest-"ments also within mentioned, and all other arrest-"ments used at the instance of the said trustees, in "virtue of the said letters of arrestment, in the hands "of the persons within named, or of any others in "whose hands they may have been used to affect "any sums belonging to the petitioners, and that "without caution or consignation; prohibit and dis-"charge the said trustees or their agents from "troubling or molesting any of the persons in whose "hands such arrestments may have been used, and

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"from using any new inhibition or arrestment in "virtue of the said letters of inhibition or arrestment, "or of any other upon the dependence of said action; "grant warrant to the keeper of the register of in- "hibitions to mark the recal of the said inhibition "on the record of inhibitions: Find the said Mrs. Bar- "bara Stuart or Herriot liable in the expense of this "application and the proceedings following thereon, "and in such other expense as may be necessary "to get the incumbrances and nexus on the petitioners "property and funds by said inhibition and arrest- "ments completely removed; allow an account thereof "to be given in, and remit the same when lodged to "the auditor to tax and report; reserving to the "said Mrs. Barbara Stuart or Herriot all claims for "relief against James John Fraser, writer to the signet, "as accords." On the same day the Court pronounced the following ex parte judgment on the petition for Gibb and others:—"The Lords, having considered this "petition and the note for Mrs. Barbara Herriot, loose "and discharge the arrestments within mentioned, "and all other arrestments used at the instance of "the said trustees, in virtue of the said letters of "arrestments, in the hands of the persons within "named, or of any other in whose hands they may "have been used to affect sums belonging to the "petitioners, and that without caution or consignation "prohibit and discharge the said trustees or their "agents from troubling or molesting any of the "persons in whose hands such arrestments may have "been used, and from using any new arrestment "by virtue of the said letters of arrestments or of "any other upon the dependence of said action against

"the petitioners: Find the said Mrs. Barbara Stuart "or Herriot liable in the expense of this application "and proceedings following thereon, and of such other "expense as may be necessary to get the incumbrance "and nexus on the petitioners property and funds "by said arrestments completely removed; allow an "account thereof to be given in, and remit the "same when lodged to the auditor to tax and report; "reserving to the said Mrs. Barbara Stuart or Herriot "any claim for relief against James John Fraser, W. S., "as accords."

Statement.

Against these judgments the appellants appealed.

Appellants.—1. The judgments under review having been pronounced ex parte, and in absence of the appellants and of Mr. Fraser, they are therefore entitled to have them set aside.

Appellants Argument.

It was impossible for Mr. Fraser to have his answers lodged within the time, while any extension of the time, though specially required by the appellants, was not granted, and the judgments under review were taken by the respondents at their own risk. They are, in every view, judgments in absence of the party having the real interest, and cited as such; and this absence, or the ex parte character of the judgments, was wholly occasioned by the fault of the respondents or their agents in pressing and precipitating the order for answers in Edinburgh within so limited a time.[1]

2. The respondents Carnegie and others not being legally appointed trustees by the truster, or in virtue of

[1] Ersk. tit. i. sec. 69.

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Appellants Argument.

powers derived from him or contained in the trust deed, have no legal title to assume the office or powers of trustees, or to act in any matter as such, or to sue or insist in that character in any suit, action, or proceedings at law whatever.

The trust deed contains a power to the trustees named of assuming other trustees to act with them in the management, and so it makes provision for the case of the trustees named not all accepting, or, where they do accept, of their numbers being diminished by death; but the trustees to be thus assumed were not to come in place of those named by the testator or to supersede or set aside their nomination, and far less was it contemplated that the trustees making the assumption were to withdraw themselves from all farther charge and from all past responsibility, and to surrender the whole trust management into new hands; and no power is given to resign, and much less to make an entire devolution on strangers.

But even if it were true that the respondents had a good title, they have failed to show any legal, just, or relevant ground for the interference of the Court, in summarily recalling the legal diligence used by the appellants as creditors for the recovery or security of their debt.

According to the authorities inhibition or arrestment in security can only be recalled where the diligence is used oppressively, or where it is a superfluous and vexatious precaution; and the instances to which reference is made are, in the first place, where the diligence is resorted to when the debtor is in good credit and his means remain unimpaired; and, secondly, where the creditor is already secured by prior diligence, by

some lien over property or effects accessible to him, or by good and sufficient caution. Where the debt sued for is plainly, on the showing of the creditor himself, fictitious or groundless, or exposed to objections instantly verified, the Court will and ought to take into view the character of the claim in judging of the question as to the recal or modification of the diligence. But the Court have seldom or never recalled the diligence without caution or consignation, and the more common course is to restrict the sum for which caution is required, and only to recal on condition of such caution being found.[1]

Appellants Argument.

Respondents.—The judgments appealed from were substantially pronounced with the consent of the appellants, who have judicially waived all opposition to the petitions the prayers of which were granted by these judgments; and in as far as the diligences recalled by the interlocutors appealed from had been used against the trust estate of Mr. Stevens, they were rightly and justly recalled, because they were radically void and inept, inasmuch as they were not directed against the proper party, but only against one trustee; while it was found by the final judgment in the action that there was an existing quorum of accepting and acting trustees, who alone were entitled to represent and bind the trust estate.

Respondents Argument.

To establish the validity of such diligence it must

[1] Bell's Principles of the Law of Scotland, p. 668, 669. 671, 672. 680; Duncan, 22d January 1822, 1 Shaw's Rep. 257; Todd, 21st November 1823, 2 Shaw's Rep. 513; Jeffrey, 11th March 1824, 2 Shaw's Rep. 797; Herbertson, 19th February 1830, 8 Shaw's Rep. 564.; Rose v. Macleay, 4 Shaw's Rep. 812; affirmed on appeal, 2 Shaw and Maclean, 958.

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be directed against the proper debtor. In the pre case part of the subjects against which the dilig was executed consisted of the trust estate of Mr. vens, vested in his trustees for the purposes of trust; and the diligence could be legally used onl a person who had become a creditor of the t estate; and no person could be such a creditor ex in respect of a debt contracted by persons entitle bind the trust estate, that is, by the trustees ac in terms of the trust settlement.

In order to make the debts said to have been c tracted by Mr. Fyffe as a trustee good claims upon trust property, it was necessary that Mr. Fyffe sho have had power to burden and bind that est Whatever may be the effect of deeds done or d contracted by a whole body of trustees, or b majority or a quorum of that body, no single tru is entitled to usurp these powers, unless the settlem which constitutes the trust were to contain a provi that every one of the trustees should have all powers of the whole body. Unless all the powers Mr. Stevens's trustees had either been given Mr. Fyffe by the trust deed, or had come to be ves in him by the death or refusal to accept of all other trustees, he could no more bind and dispos the estate as a single trustee than as an individ not a trustee; and those who deal with a per professedly acting as a trustee, are bound to sati themselves as to his powers, and that he is act within them.

As the summons which is the foundation of diligence was exclusively directed against Mr. Fy as the sole accepting and acting trustee, it was o

as against him that inhibition and arrestment could be used.

The arrestments recalled by the interlocutors, having been used to attach the rents of Baron Fyffe's property, were rightly and justly recalled, because the respondents, who were owners of that property, not only were not debtors to the appellants, but were not said to be debtors, and the action on the dependence of which the arrestments were used was neither directed against them nor contained any conclusion against them.

Arrestment of the rents of this property could be used only on debts due by the proprietors, and no arrestment at the instance of a creditor of one of the proprietors could be valid to attach any thing more than the share of the rents belonging to that one. But not one of the children, neither the respondents nor any of their brothers and sisters, were so much as named as defenders in the summons, which proceeded exclusively against Mr. and Mrs. Fyffe, for whose debts, if they had contracted such debts, the children were not responsible, and their property could not be attached; neither was there any conclusion for payment against any of the children, simply because the appellants could not aver that any one of them had contracted a debt; and even the summons was not executed against any of the children, nor were they called as defenders in the action. Accordingly, the final judgment in the cause has found that, "in so far "as the rights and interests in the estate of the said "Baron Fyffe are vested in the children of the said "James Fyffe, there is no competent conclusion in the "summons under which any judgment can be pro-

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"nounced to affect the said children, or their rights "and interests in the said estate."

As Mr. and Mrs. Fyffe and six of the children had conveyed their shares of Baron Fyffe's property to the respondent Mr. Gibb as a heritable security for money advanced by him to them, and that security was granted and completed by a recorded infeftment before the arrestments at the instance of the appellants were used, these arrestments were of no effect as in a question with him, and therefore were rightly and justly recalled at his instance by the interlocutor under appeal.

Under these circumstances the respondents submit that the judgments appealed from ought to be affirmed, because, as the inhibition and arrestments thereby recalled had been used on the dependence of an action to constitute certain alleged claims as debts against the trust estate of Mr. Stevens, and the shares of Baron Fyffe's property belonging to Mr. Fyffe's children, and it was found and decided that these claims did not form good debts against the one property or the other, the diligences themselves necessarily fell to be discharged.[1]

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this case, which is very much connected with that upon which your Lordships gave judgment last week, was heard before that case, but I thought it expedient to postpone the consideration of the judgment in this case until that had been disposed of. My Lords, I think the result has

[1] Bell, ii. 151.

proved that to be a good arrangement, inasmuch as the decision to which your Lordships came in that case will no doubt weigh very much upon your minds in the present.

This was an appeal against an order "recalling the "inhibition as far as regarded Captain James Fyffe as "a trustee, discharging the arrestment mentioned, and "all other arrestments used at the instance of the "trustees by virtue of the said letters of arrestment in "the hands of the person therein named." But then it reserved to Mrs. Barbara Stuart or Herriot all claims of relief against James John Fraser, writer to the signet, and so on. The result of this was, that after an interlocutor declaring the rights of the parties in this suit of intromission, the attachments which had been obtained pending the suit on the application of the parties against whom they were obtained were discharged in the manner stated in the interlocutor. The nature of the suit was a claim on behalf of those who claimed originally through Mr. Fraser as the party actually pursuing, but claiming through him in respect of a trust estate which had been given by Mr. Stevens in trust for the separate use of the wife, and after her death to the children, excluding the husband. By that trust deed the husband was made a trustee with several other persons; it also affected certain estates which had descended from Baron Fyffe, which he gave to his brother James Fyffe and his wife and their children in equal portions. My Lords, it has been argued that that gave an estate to James Fyffe which he had power to dispose of. I apprehend it is quite immaterial for the present purpose that your Lordships should consider that question, inasmuch as it is a point not made

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by the pursuers here; and it is a question not only made by the pursuers, but the interlocutor as it stu assumes that the children had an immediate intere that property. The summons states the title of parties in these words:—"That Baron Fyffe died, "the said James Fyffe, Mrs. Jean Stevens or F "and their children on that event by virtue of the "last-mentioned will or deed of settlement succe "to the two third parts or shares of the different "perties." And in the interlocutor which is appe from, and which declares the rights of the parti the suit which is the subject of the present ap the interlocutor of the Lord Ordinary, whicl affirmed on reclaiming to the Inner House, st "that so far as the rights and interests in "estate of Baron Fyffe are vested in the childr "James Fyffe, there is no competent conclusio "the summons under which any judgment ca "pronounced to affect the said children, or "rights or interests in the said estate." The chil were in fact not made parties to that suit.

My Lords, the law of Scotland as relating to subject is, I believe, very accurately stated in the of the appellants. I have referred to the autho there cited, and I see no reason to doubt the accu of it; and taking the law as there laid down, I t your Lordships will have very little difficulty in a ing it to the present case. It is stated in the e page of their case:—"But arrestments on inhibitio "security, or in other words used for securing c "either future or contingent, according to their "nature, or, like the debt in the present inst "actually claimed to be due but not yet consti

"by decree, the diligences are liable to be abused, "and creditors are occasionally found employing them "for the purposes of vexation or oppression. In these "cases the Court of Session, in the exercise of their "equitable powers, are authorized to grant a remedy "by either recalling the diligence in toto or on caution "to a limited extent. But in all applications of that "nature by the debtor, it lies upon him to make out a "case of vexation or oppression, and to show sufficient "cause for the interference of the Court, as the recall "or modification of diligence is an extraordinary exer- "cise of power, to be applied only in cases of excess or "abuse of legal remedies.[1] Thus it is also observed by "Professor Bell that arrestment in security may be "recalled without caution or loosed on caution in the "following cases: first, where arrestment in security is "used oppressively, and even where used nimiously "(*i. e.* where it is a superfluous and vexatious precau- "tion), the Lord Ordinary on the bills seems entitled "to recall it, or restrict it, or grant warrant for loosing "without caution, as in a future or contingent debt, "where there is no change in the debtor's credit, or "where the creditor is already secured by diligence, "caution, &c., and there is no ground to suspect the "security: second, loosing on caution when the time "of payment has not arrived or the debt is not "yet constituted, or when it is under suspension; "the arrestment may be loosed on caution, and the "arrestee authorized to deliver up the subject or pay the "debt. This is done on a bill for loosing the arrestment "in the Court of Session, on an application to the Judge

[1] Bell's Principles of the Law of Scotland, p. 680.

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"by whose warrant the arrestment has been used. The "proceeding is either, first, for a special loosing of some "particular arrestment, or, second, for a general loosing "of all arrestments used or to be used by the creditor.[1] "In like manner as to inhibition the same author "observes, that inhibition may be recalled, if injurious "or oppressive, where the debt is future, contingent, "or not yet constituted; not where the debt is due."[2]

Now, my Lords, assuming that to be a correct representation of the law of Scotland, it is only necessary to call your Lordships attention to the facts of the case, and to see whether this is not a case in which the Court was bound to recall these attachments. My Lords, the claim, as I have stated, was made by the party pursuing, claiming in the right of Fraser, upon the inhibition and arrestment having issued. No application was made to get rid of them until the interlocutor to a certain extent had adjudicated upon the rights of the parties. When that interlocutor had been pronounced application was made to get rid of these proceedings. The only party in the cause (Fraser having parted with his interest) was Mrs. Stuart claiming in the right of Fraser, and therefore of course affected by all the equities which might affect Fraser.

The first objection to this order was, that there was not a proper service; that Fraser himself, being no party to the record, was at the time in England, and there was no regular service of the order; that, though regular in point of form, in substance it was no notice to Fraser. Now, what was the proceeding which was

[1] Bell's Principles of the Law of Scotland, pp. 671, 672.
[2] Ibid. p. 680.

adopted by the parties pursuing, against whom the application was made? They certainly applied in the first instance for time to communicate with Fraser; then this representation was made to the Court:— "The respondent begs farther to state, that, although "in consequence of the arrangement which her son "made with Mr. Fraser, she is not yet perhaps in a "situation to prevent the latter from using her name, "if he thinks proper, in answering this petition, "notwithstanding steps which she is adopting in order "to get rid of the predicament of allowing her name "to continue to be used in this manner. She herself "has no intention to trouble the Court with opposition "to the petition upon its merits if Mr. Fraser shall "not so oppose it in her name; she presumes that in "that event petitioners would not demand expenses "from her." Though the parties were to go on in the name of Fraser, she forbids their going on in her name; but he was the only party with whom the other parties could deal, and the only party with whom they were contending upon the record. In point of fact, she does not make any resistance to the order so obtained.

My Lords, with respect to the merits of the case; first of all, as to Stevens's estate. Here is a trust under which, by some strange arrangement, the husband, against whom a provision was made, was constituted a trustee for the wife, the property being settled on the wife and children to the exclusion of the husband. The husband, in his character of trustee, to a certain degree deals with this property. That is decided by the interlocutor which is appealed from to be improper, —that there was no right of dealing with the rents of

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this estate, which were to be applied yearly to the aliment of the wife and family. There was a power in the trustees, in an event which never took place, of raising money; but that power not only never was exercised, but never could be exercised so as to interfere with the property. There, therefore, in regard to that estate was nothing which could be constituted a debt except the year's rent. In the summons there is no other claim; but the interlocutor of the Lord Ordinary opens a door to the possibility of a further claim, namely, that by possibility there may have been expenses incident to the trust, that is, in executing the trust to which Captain Fyffe as trustee may have claim against the estate. There is no such statement in the summons. It is a possibility, according to the interlocutor of the Lord Ordinary, which might affect the rights of the parties; and if such a claim did arise it might affect the corpus of the estate. Now, first all, there is an extreme improbability of the parties making out a claim which they never thought suggesting upon the record, but still the interlocutor leaves it open to them, if they care to make it out.

With regard to the estate of Baron Fyffe, the interlocutor, without referring at all to the will under which the question must arise, states that quoad the interest of the children, they, not being parties to the proceedings could not possibly be affected by the proceedings which took place between the parties. The claim of Fraser is through James Fyffe acting as trustee for Baron Fyffe's estate; there was no trust, so far as James Fyffe might be a debtor to Fraser. No doubt, as to interest he might have in the estate might be subject to the proceedings; but as far as the wife and children

are concerned, which is affirmed in the interlocutor, and is assumed indeed by the language of the summons itself, they cannot be affected by any proceedings which have taken place in this cause.

My Lords, under these circumstances the interlocutor which has been adhered to in the Inner House has declared, that quoad the trust estate there was no right in Fraser beyond a possibility, which does not touch the present question; for there is no question as to the current year's rent; the proceeding is in respect of future years rent; and as to the interest of the wife and children in Baron Fyffe's estate, there is no question which can arise as to any right existing in Fraser claiming through James Fyffe to so much as may belong to James Fyffe himself. Under these circumstances, there being nothing against the trust estate but this possibility of a claim—so little likely to succeed as not to be included in the summons, the whole of the trust property and the whole of Baron Fyffe's property are subjected to this process of attachment upon the application of the parties who were appellants. According to the authorities referred to by the appellants themselves the court thought proper to recall this attachment, and, if there were nothing else, it would be quite clear that the Court made a proper adjudication of the rights as far as the interlocutor goes. Under the adjudication of those rights there is very little which by possibility can remain to the pursuer to recover in that case. If no more were shewn, I should have thought the Court had exercised a sound discretion in recalling the attachment in respect of this property. But, my Lords, there are other circumstances in the case to which I have not alluded,

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but which are perfectly conclusive. This all proceeds upon the ground that Fraser is a creditor upon the trust estate; your Lordships have had before you an interlocutor of the Court of Session which makes him a debtor of 2,500*l.* upon the same estate. In the case which stood immediately after the one now under consideration, there is the judgment of the Court of Session in favour of that demand against Fraser, and your Lordships have affirmed that interlocutor. The demand therefore is finally established, and instead of being a creditor he is proved to be a debtor to the estate. That fact is quite conclusive in this case; the parties who appear here as respondents come here not only to protect their interest against the demand of Fraser but to establish a claim against Fraser. It is unnecessary to go further into the case, because when you find, independently of the merits of the case as established upon this record, the party claiming the benefit of these proceedings by his appeal is by the judgment of your Lordships House proved to be a debtor instead of a creditor, there must be an end of any debt which would entitle him to be paid out of this supposed security which is the subject of the proceedings now under discussion. There are now, therefore, additional reasons beyond those which appeared to the Court of Session for this interlocutor, and I cannot help saying that in my opinion there never was a case which has come before your Lordships in which it was more clearly shewn that the interlocutor of the Court of Session ought to be affirmed, and affirmed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this

House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant, the said James John Fraser, do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal since he so sisted himself as appellant as aforesaid, the amount of such costs to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

THOMAS C. KER—ROBERT SCOTT, Solicitors.

[*3d May* 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 9.) THE PRESBYTERY OF AUCHTERARDER, Appellants.—*Sir F. Pollock—Pemberton—R. Bell.*

The Earl of KINNOULL and the Rev. ROBERT YOUNG Respondents.—*Attorney General (Campbell)—Knigh Bruce—Whigham.*[1]

Patronage—Church—Jurisdiction—Acquiescence.—A patron granted a presentation to a vacant church and parish in favour of a presentee, who accepted of it; the presbytery of the bounds found that they must proceed to fill up the vacancy, in terms of an act of the general assembly 31st May 1834, entitled "Overture and Interim Act on "Calls," and the relative act of assembly, 2d June 1834, entitled "Overture with Regulations for carrying the "above Act into effect," in which sentence the patron acquiesced; the presbytery further "did, in pursuance of "the first regulation of the act of assembly anent calls, "in so far sustain the presentation as to find themselves "prepared to appoint a day for moderating in a call to "the presentee;" the call was signed by three individuals; no special objections were stated against the presentee, but a veto or dissent was lodged by a large majority of the male heads of families, members of the congregation, and in full communion with the church. The patron and presentee took appeals to the superior church courts against the admission of those dissents; but, on the ground exclusively that the provisions of the acts of assembly had not been adhered to, these appeals

[1] Rep. 16 D. B. M. 661., and see "Report of Auchterarder Cause," by Charles Robertson, Esq., Advocate, 2 vols. Edinburgh, 1838.

were dismissed. The presbytery thereafter, without taking the presentee on trials as to his life, doctrine, or literature, &c., did, in respect of that dissent or disapproval, and in conformity with the above acts of assembly, "reject the presentee, so far as regarded the particular "presentation on their table, and the occasion of that "vacancy in the parish." The patron and presentee then raised a declarator against the presbytery, concluding, inter alia, that the presentee had been validly and effectually presented to the church and parish; that the presbytery were and are bound to make trial of his qualifications, and, if they found him qualified, were bound to receive and admit him as minister of the church and parish; and that their rejection of the presentee was illegal, and contrary to the laws and statutes libelled. The presbytery admitted the validity of the presentation, but, as to the other conclusions above recited, they declined the jurisdiction of the Civil Court as incompetent to determine as against them, their duty as a Church Court being in a matter ecclesiastical; but, under reservation of that objection, they pleaded in defence that their whole proceedings were, on the merits, unchallengeable: —Held (affirming the decision of the Court of Session) that the objection to the jurisdiction of the Court ought to be repelled; that the pursuer, the presentee, was validly and effectually presented to the church and parish; that the presbytery did and do refuse to take trial of his qualifications, and had rejected him as presentee, on the sole ground that a majority of the male heads of families, communicants in the said parish, had dissented, without any reason assigned, from his admission as minister; that the presbytery in so doing acted to the hurt and prejudice of the pursuers, illegally and in violation of their duty, and contrary to the provisions of the statutes libelled, particularly 10 Anne, c. 12., intituled "An Act to restore patrons to their ancient "rights of presenting ministers to the churches vacant in "that part of Great Britain called Scotland;" and that the defences of the presbytery should be in so ar repelled.

1st Division.

Lord Ordinary Fullerton.

AT a meeting of the general assembly of the kirk of Scotland, held on 31st May 1834, it was declared and enacted, among other things, "that it shall be an in-"struction to presbyteries, that if, at the moderating "in a call to a vacant pastoral charge, the major part "of the male heads of families, members of the vacant "congregation and in full communion with the church, "shall disapprove of the person in whose favour the "call is proposed to be moderated in, such disap-"proval shall be deemed sufficient ground for the "presbytery rejecting such person, and that he shall "be rejected accordingly, and due notice thereof forth-"with given to all concerned." Regulations were framed at a meeting of assembly on 2d June 1834, and transmitted as an interim act to presbyteries for their approval.

The church and parish of Auchterarder became vacant by the death of the Rev. Charles Stewart, on 31st August 1834.

Upon the 16th September 1834 the Earl of Kinnoull, the undoubted patron of the said church and parish, granted a presentation in favour of the Rev. Robert Young, a duly qualified licentiate of the church of Scotland.

At a meeting of the presbytery of Auchterarder, held at Trinity Gask on the 14th of October 1834, Mr. Robert Hope Moncrieff, writer in Perth, on the part of the Earl of Kinnoull, laid on the table of the presbytery the said presentation, duly executed, his lordship in the usual form thereby nominating and appointing Mr. Young to be minister of the said church and parish, and requiring the reverend the moderator and presbytery of Auchterarder to take trial of the qualification, literature, good life, and conversation of the said

Robert Young; and after having found him fit and qualified for the functions of the ministry in the church and parish of Auchterarder, to admit and receive him thereto, by ordaining and admitting him in due and competent form accordingly, all conform to the deed of presentation itself.

There were produced to the presbytery by the said Robert Hope Moncrieff a certificate that the Earl of Kinnoull had, as patron, qualified himself to exercise his right of patronage by taking the requisite oaths to government; a letter of acceptance, by the Rev. Robert Young, of the presentation; a certificate of his having qualified himself to accept of and hold the said presentation, by taking the usual oaths to government; also the usual parochial certificate; and a certificate signed by five ministers of the presbytery of Dundee, that the pursuer, the Rev. Robert Young, was a duly qualified licentiate of the church of Scotland, having received his licence from the said presbytery. There was likewise produced an engagement to exhibit an extract of the pursuer's licence as soon as a meeting of the presbytery of Dundee should be held. The deed of presentation and relative papers having been read, they were appointed to lie on the table till next meeting of presbytery.

At a meeting of the presbytery, which was held at Auchterarder on the 27th of October 1834, Mr. Robert Hope Moncrieff, on the part of the Earl of Kinnoull, produced an extract of the licence of the pursuer, the Rev. Robert Young, as a preacher of the gospel, and testimonial in his favour by the presbytery of Dundee; which having been read, and the presbytery "considering that all the documents usually given in

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" cases of this kind have already been laid on the t
" along with the presentation by the Earl of Kinn
" to Mr. Robert Young, preacher of the gospel, t
" minister of the church and parish of Auchterar
did so far sustain the presentation as to find thems
prepared to appoint a day for moderating in a ca
the pursuer; and accordingly they appointed on
their number to preach in the church of Auchtera
on Sunday then next, being the 2d of November,
to intimate that the presentee would preach in
church of Auchterarder on Sunday the 16th, and a
on Sunday the 23d of the same month. Intima
was likewise directed to be made that the presby
would meet in the church of Auchterarder on Tue
the 2d of December, to moderate in a call, in the u
way, to the pursuer, the Rev. Robert Young, t
minister of that parish. In the foresaid deliveran
the presbytery of Auchterarder Mr. Hope Monc
on the part of the Earl of Kinnoull, acquiesced,
took instruments in the clerk's hands; but in so fi
the deliverance at all sustained the presentation, tw
the members of the presbytery dissented, on the gr
that by so doing the presbytery did seem to homolo
and approve of patronage.

At a meeting of the presbytery which was hel
Auchterarder on the 2d of December 1834, for
purpose of moderating in a call to the pursuer, t
was produced and read a call, subscribed in his fa
by three of the parishioners, to be minister of the
church and parish; whereupon the presbytery, in t
of the said interim act of assembly, afforded an op
tunity to the heads of families, members of the
gregation and in communion with the church,

themselves, or by an agent duly authorized, to state any special objections or dissents to the settlement of the pursuer, of whatever nature such objections might be; but no special objections were given in. In terms of the said interim act the presbytery then proceeded to afford an opportunity to the male heads of families, whose names were alleged to stand on a roll, "to give in "dissents on the call and settlement of Mr. Robert "Young as minister of the parish. The following heads "of families (287 in number), whose names stand on "the roll, did then appear before the presbytery, and "did personally deliver their dissent or disapproval of "the presentee:" and the presbytery thereupon found that "dissents have been lodged by an apparent ma-"jority of the persons on the roll inspected by the "presbytery," and they adjourned consideration of the case until their next meeting, to be held at Auchterarder on the 16th of December 1834; against which sentence a protest was taken for Mr. Young.

At another meeting of the presbytery, which was held at Auchterarder on the 16th of December 1834, in respect that none of the persons who had dissented from the settlement of Mr. Young appeared to withdraw their dissents, the presbytery again found "that there "is a majority of the persons on the roll still dissenting."

These proceedings having been submitted to the review of the superior church courts, viz., the synod of Perth and Stirling and the general assembly, and a remit having been made to the presbytery to proceed in terms of "the interim act of the then last general "assembly," at a meeting of the presbytery held at Auchterarder on the 7th of July 1835, the presbytery,

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by their deliverance and sentence, did "reject the "pursuer, Mr. Robert Young, the presentee to Auch- "terarder, so far as regards the particular presentation "now on their table and the occasion of this vacancy "in the parish of Auchterarder, and do forthwith "direct their clerk to give notice of this their deter- "mination to the patron, the presentee, and the elder "of Auchterarder."

No special objections were stated against the pre- sentee's qualification or settlement; the presbytery nevertheless did not take him upon trials, and pro- nounce judgment on his qualifications as presentee for said; but refused to do so, and to admit and receive him as minister of the said church and parish.

Thereafter a summons of declarator was brought in the Court of Session by the Earl of Kinnoull, as patron, and Mr. Young, as the presentee of the parish of Auch- terarder, which summons (as amended) libelled on the statutes 1567, c. 7.; 1592, c. 116. and 117.; 1690, c. 23.; 10 Anne c. 12. (1712); and set forth the above proceed- ings, and refusal of the presbytery to induct the presentee. It then proceeded: — "That the foresaid judgments or "deliverances of the said presbytery, of date 2d De- "cember 1834 and 7th July 1835, were ultra vires "illegal and unwarrantable, in so far as that though "by the laws and statutes before libelled the presby- "tery were bound and astricted to make trial of the "qualifications of the pursuer, Robert Young, as "presentee to the church and parish of Auchterarder, "and were not entitled to delegate to or devolve that "duty on third parties, or to denude and abandon "their right and duty as a church court, to judge of

House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant, the said James John Fraser, do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal since he so sisted himself as appellant as aforesaid, the amount of such costs to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

THOMAS C. KER—ROBERT SCOTT, Solicitors.

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" thereof to discharge their duty in terms of law
" and the statutes libelled, by proceeding with the
" trials, admission, and final settlement of the pursuer,
" the said Robert Young, as minister of the church
" and parish of Auchterarder, yet they illegally,
" contumaciously, and in violation of their duty, and
" to the serious injury and prejudice of the patri-
" monial rights of the pursuers, refused and continue
" to refuse so to do."

The principal conclusion was, ".Therefore it ought
" and should be found and declared, by decree of the
" Lords of our Council and Session, that the pursuer
" the said Robert Young, has been legally, validly
" and effectually presented to the church and parish
" of Auchterarder: That the presbytery of Auch
" terarder, and the individual members thereof, as the
" only legal and competent court to that effect by law
" constituted, were bound and astricted to make trial
" of the qualifications of the pursuer, and are still
" bound so to do; and if in their judgment, after due
" trial and examination, the pursuer is found qualified
" the said presbytery are bound and astricted to receive
" and admit the pursuer as minister of the church and
" parish of Auchterarder according to law: That the
" rejection of the pursuer by the said presbytery as
" presentee foresaid, without making trial of his qualifi
" cations in competent and legal form, and without
" any objections having been stated to his qualifica
" tions, or against his admission as minister of the
" church and parish of Auchterarder, and expressly on
" the ground that the said presbytery cannot and ought
" not to do so in respect of a veto of the parishioners
" was illegal, and injurious to the patrimonial rights a

"the pursuer, and contrary to the provisions of the "statutes and laws libelled."

The summons also contained other conclusions, the first of which was directed against the presbytery and the collector of the ministers widows fund, for decree ordaining them not to molest the said Robert Young in the possession and enjoyment of the stipend, manse, and glebe, and whole other emoluments belonging and pertaining to the said church and parish.

The next conclusion was directed against the heritors, for decree against them to pay their respective shares of the stipend to the said Robert Young during his life, and to perform and fulfil all the other obligations incumbent upon them, as heritors, to him, as legally, validly, and effectually presented to the said church and parish, or otherwise to declare that the Earl of Kinnoull had legally and validly and effectually exercised his right as patron; and that the said presbytery of Auchterarder, and the individual members thereof, had illegally and in violation of their duty and of the several laws and statutes before libelled, refused to make trial of the qualifications of the said presentee, but had illegally and in violation of their duty and of the laws and statutes libelled as aforesaid, rejected the said Robert Young as presentee; and therefore that the pursuer, the Earl of Kinnoull, had right to and was entitled to receive and retain the whole stipend and emoluments of and pertaining to the said church and parish of Auchterarder from the date of citation hereto, and in all time coming during the life of the said Robert Young; and it being so found and declared, the presbytery and collector of the widows fund, and all others, should be ordained to desist from molesting the pursuer, the said Thomas Ro-

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bert Earl of Kinnoull, in the possession and use in tim[redacted] coming, during the life of the said Robert Young, of th[redacted] stipend, manse, glebe, and other emoluments belongin[redacted] and pertaining to the said church and parish, and th[redacted] the heritors of the parish should be accordingly ordain[redacted] to pay their respective shares of stipend to Lord Ki[redacted] noull during the life of Mr. Young.

The presbytery in their defences admitted Lo[redacted] Kinnoull's right of patronage and the validity of t[redacted] presentation, but objected to the jurisdiction of t[redacted] civil court to take cognizance of and decide on p[redacted] ceedings of a church court, which, according to t[redacted] enactments of the superior church judicatory as esta[redacted] lished by law, and by virtue of which the presbytery h[redacted] acted, were warrantable and regular.

It was agreed that the discussion should be confin[redacted] to the first or principal declaratory conclusion. A r[redacted] cord was made up and closed.

The question at issue was raised by the followi[redacted] statement in the condescendence for the pursuers:—

Art. XI.—"That the foresaid sentence" (that is to sa[redacted] the sentence of the presbytery of 7th July 1835[redacted]) "whereby the presbytery rejected the Rev. Robe[redacted] "Young, pursuer, as presentee to the church an[redacted] "parish of Auchterarder, proceeded exclusively on th[redacted] "ground of the veto or dissents exercised by th[redacted] "alleged majority of heads of families or parishione[redacted] "of Auchterarder."

The answer made to that statement by the presbyte[redacted] was, Ans. XI.—"Admitted."

The Lord Ordinary reported the cause on Cas[redacted] and by order of the Lords of the First Division a hearing in presence took place before the wh[redacted]

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Court, and their Lordships, having taken time to consider, delivered their opinions seriatim at great length.

Thereafter, upon hearing counsel for the parties and before pronouncing judgment, the Court, 8th March 1838, allowed the following minutes to be lodged:—

"MINUTE for the Reverend the Presbytery of Auchterarder.

"Mr. Solicitor General for the presbytery of Auchterarder, of consent of the Dean of the Faculty, for the pursuers, craved the Court to allow the following plea in defence to be added to the record:—

"The pursuers are barred by acquiescence from objecting to the proceedings of the presbytery of Auchterarder and pleading that the same were illegal. (Signed) "*And. Rutherfurd.*

"Edinburgh, 8th March 1838.—The Lords, having heard the above minute of consent of parties, allow the above plea in defence to be added to the record. (Signed 10th March.)

(Signed) "*C. Hope*, I.P.D."

"MINUTE in answer for the Pursuers.

"Before the Court proceeded to give judgment and pronounce their interlocutor the Dean of Faculty, on the part of the pursuers, stated that he did not and never had objected to the Court entertaining and considering any plea raised by the defenders in argument, either as to the alleged personal objection to the action founded on acquiescence stated in the proceedings of the presbytery under the veto act, or as to the alleged objection to the sufficiency of the summons. (Signed) *John Hope.*"

The following interlocutor was thereupon pronounced:

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Judgment of Court, 8th Mar. 1838.

—"Edinburgh, 8th March 1838.—The Lords of the
"First Division having considered the Cases for the
"Earl of Kinnoull and the Reverend Robert Young,
"and for the presbytery of Auchterarder, with the
"record and productions, and additional plea in de-
"fence admitted to the record, and heard counsel for
"the said parties at great length in presence of the
"Judges of the Second Division and Lords Ordinary,
"and having heard the opinions of the said judges,
"they, in terms of the opinions of the majority of the
"judges, repel the objections to the jurisdiction of the
"Court and to the competency of the action, as di-
"rected against the presbytery: Further, repel the
"plea in defence of acquiescence: Find, that the Earl
"of Kinnoull has legally, validly, and effectually exer-
"cised his right as patron of the church and parish of
"Auchterarder, by presenting the pursuer, the said
"Robert Young, to the said church and parish: Find,
"that the defenders, the presbytery of Auchterarder,
"did refuse, and continue to refuse, to take trial of the
"qualifications of the said Robert Young, and have
"rejected him as presentee to the said church and
"parish on the sole ground (as they admit on the
"record) that a majority of the male heads of families,
"communicants in the said parish, have dissented,
"without any reason assigned, from his admission as
"minister: Find, that the said presbytery in so doing
"have acted to the hurt and prejudice of the said
"pursuers, illegally and in violation of their duty, and
"contrary to the provisions of certain statutes libelled
"on, and in particular contrary to the provisions of
"the statute of 10 Anne, c. 12, intituled, An act to
"restore patrons to their ancient rights of presenting

ministers to the churches vacant in that part of Great Britain called Scotland: In so far repel the defences stated on the part of the presbytery, and decern and declare accordingly, and allow the above decree to go out and be extracted as an interim decree; and, with these findings and declarations, remit the process to the Lord Ordinary, to proceed further therein as he shall see just. (Signed 10th March.)

(Signed) *C. Hope*, L.P.D."

The presbytery appealed.

Appellants Argument.

Appellants. — Two questions had to be considered: (1.) whether the general assembly were competent to pass, cum effectu, the interim act of 2d June 1834? and (2.) whether, supposing that such interim act was alleged to be ultra vires of the general assembly, the Court of Session had power to entertain the question of its legality? Now, all that related to the call, trial, induction, or collation of ministers was matter purely of ecclesiastical regulation, and cognizable only by the ecclesiastical courts. The acts of the different assemblies from 1560 downwards proved that all such matters as now sanctioned by the laws and daily practice of Scotland were so determined on by the assembly in exercise of its strictly ecclesiastical powers. The propriety or wisdom of the different acts of assembly did not come into question; the proper inquiry being, whether the assembly had the right. Now, the usage or actual exercise of power afforded the strongest confirmation of its legality. The constitution of the kirk of Scotland, as sanctioned and approved by acts of parliament, afforded no trace of any authority in the civil court to overrule

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and control their proceedings in matters ecclesiastic excepting during three short periods, which confirm t general rule.

With regard to the respective powers of the eccle astical Court and the Court of Session, it seemed have been assumed that the Court of Session had immemorial right to interfere in all matters affecting t rights of individuals; but this could not be, as th Court was established and its powers defined by act parliament, which confined its proceedings to ci actions, and gave no jurisdiction in matters eccle astical. It could not be shown that ecclesiastical jur diction had been given by any subsequent statu Besides the Court of Session or Supreme Civil Cou Scotland had also its Court of Justiciary or Supren Criminal Judicatory, as well as its Church Courts, co sisting of the General Assembly of the Kirk, and i subordinate tribunals, so that there were three separa coexistent though independent jurisdictions. The kir as reformed, succeeded to the whole jurisdiction exe cised by the pope and bishops; and that was now veste in the proper Church Courts. The Commissary Cour now merged in the Court of Session, took cognizanc of certain cases which might be considered partly civ and partly ecclesiastical; but no argument could b raised from that fact.

The recognition of the ecclesiastical jurisdiction, exer cised by its proper courts, was proved by abundan statutory authority; also by the text writers, excepting Bankton[1], (the value of whose authority had bee

[1] *Lord Brougham*, when moving judgment, stated that the next tim an opinion was brought forward questioning the authority of Bankton his lordship would inquire into the grounds of that opinion.

commented on by Lord Moncreiff in his opinion below.) The opinions of Forbes and Erskine were confirmed by decisions, and had been fortified by the actual exercise of legislative powers by the general assembly, — the inferior church judicatories being bound to give obedience to laws and usages sanctioned by the general assembly. The decisions of the Court of Session, corrective of excess in the exercise of statutory powers by inferior courts, were not applicable, particularly where a party had not followed out his regular course of appeal through such inferior judicatories.

And even although the act of assembly complained of might be ultra vires, still, as was shown by the authorities, well explained by Lord Cockburn below, the Court of Session had no power to direct an inquiry by civil process into the legality or illegality of the act, for it is a civil court merely, possessing only civil jurisdiction, as given by statute; and where it possessed jurisdiction in certain ecclesiastical matters it was only where such jurisdiction was given by statute.

Did the question here involve matter of civil or ecclesiastical jurisdiction? The call and ordination of a minister to discharge the duties of the cure of a parish could not be considered otherwise than as ecclesiastical matter. There was no such thing in Scotland as ministerium vacuum; for there a minister is licensed, and when ordained is set apart to a particular cure. Then the call is no mere matter of form. No minister could be admitted unless there had been a moderation of the call, which was, therefore, a necessary as well as a substantial part of the ecclesiastical procedure in the settlement of a minister. Upon the record as between these parties there was no question

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upon which the Court of Session could pronounce valid decision. Viewing it as a question of the fitne of the minister presented, that Court had no power; was not enough to say that it related to the acceptabl ness of a minister, and not to his fitness, as if it we not true that although acceptableness might not l fitness, still his unacceptableness was clearly unfitne and therefore raised an inquiry as to his being qualifi or fit, or not, for the cure of this particular paris There was no instance of interference by the Court Session, unless the right of the patron or stipend w affected. To synods there had been numerous an repeated appeals in ecclesiastical matters, and touchin settlements, and also to the general assembly both b reference and appeal. In this case the appellan Mr. Young, had taken that course, although he afte wards thought proper to depart from that which w the legitimate mode, of having the authority of th general assembly, and the regularity of the proceedin of the presbytery enquired into and determined.

Respondents Argument.

Respondents.—They now complained of a civil injur sustained through the refusal to admit a presentee dul licensed, and not on the score of qualification, as hithert understood, but on the sole pretext of a veto or dissen which went to a complete denial of the right of th patron. The important question then was, whether th patron and presentee had any remedy for the latte having been so illegally prevented from being admitte to the benefice. The appellants do not say ther is any remedy; they allow that the present mod adopted was the proper remedy, or there was none but said, the Court of Session had no jurisdiction

and therefore the presentee had no redress. Suppose there had been a wrong, there must be a remedy; and to ascertain whether there was jurisdiction in the Court where the remedy was sought, the wrong—the illegality of the veto act—must be assumed. Injuria et damnum must be shown, and then the right of action arises; but there must be both.

Generally, the sound and obvious view was that up to the year 1834 it was not pretended that there was any law entitling presbyteries to refuse to take on trial presentees who, if qualified, were entitled to be ordained and inducted into the cure of the parish. Had the law before 1834 sanctioned exclusion on the score of dissent, there would have been no necessity for, and there would in fact have been no ecclesiastical legislation attempted on the subject. And the necessity of such legislation through the want of any such pre-existing right of dissent without reason, was evident from the notorious fact that the framers of the scheme did not at first agree as to the class of persons in whom such right of dissent, without reason assigned, should be placed; so that it must have been not in its administrative capacity as an ecclesiastical court, but as a legislative body, that the assembly acted in 1834; and it now sought as a court to interpret and enforce the law, not as sanctioned by the legislature and explained by the judicatories of the land, whether civil or ecclesiastical, but the law as confessedly made or altered by the assembly itself. Thus there was no conflict, and could be none betwixt the two courts, considered strictly as courts; and no conflict of decisions, so long as both courts confined their proceedings within proper judicial bounds.

The stat. 1592, c., 16, establishing presbytery, gives

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collation on presentations to the presbytery, "providin
" the said presbyteries be bound and astricted to receiv
" and admit quhatsumever qualified minister presente
" be his Majesty or laick patrons:" And by th
10th Queen Anne, c. 12, (1711,) it was again enacte
and declared, on restoring patronage (which the sta
1690, c. 23, had suspended,) "That the presbytery c
" the respective bounds shall and is hereby obliged t
" receive and admit in the same manner such qualifie
" person or persons, minister or ministers, as shall b
" presented by the respective patrons:" And the dut
thus imposed upon presbyteries by the legislature ha
never been discharged by any act of the legislature, an
cannot be repudiated, destroyed, or abandoned by th
kirk of Scotland, or any right of peremptory rejectio
of the presentee given by the church to a third party
to the effect both of excluding the duty imposed on th
church courts and of the defeating the patron's rights.

The interim act of the general assembly 1834 in th
principle of it necessarily raises and disposes of question
of civil right, the determination of which belonged t
and was within the jurisdiction and competence of th
civil court; for the veto or right of peremptory rejec
tion thereby conferred on the male heads of families i
a parish was altogether distinct and separate from a cal
by the congregation, and unauthorized either by th
nature of a call, or by any of the enactments of th
church in regard to calls; and accordingly in this cas
the moderation of the call was over before the dissent
or veto were given or asked for.

A call was never, during any period in the history
of the kirk of Scotland prior to 1690, in which the right
of patronage was recognized by law, admitted or acted
upon as a means of controlling the right of patronage,

or as any part of or necessary to the title or appointment of the presentee, and to his right to be taken on trials, and (if found on trial to be qualified) to be inducted. The call, in its origin, object, and principle, was a mode of appointment or nomination when patronage was not in force or secured by law. After the restoration of patronage by the statute of Queen Anne the call continued to be acted upon as a mode of election in some cases in which the patrons did not choose to exercise their right of presentation at all; sometimes also as a mode of appearing to elect the presentee of the patron, in the hope of preserving a kind of protest against the act of parliament; but it was known and acknowledged that a call was not a form applicable to the case of presentation by a patron, or which could in that case have any effect against the title of the presentee, and his right to be taken on trials. And it came also to be resorted to for a considerable time by parties in the church, in order to thwart the right of presentation by an admitted perversion of the true object of a call.

A call by the congregation, in the sense of warranting peremptory rejection by the male heads of families without reasons assigned, is inconsistent with the rights of lay patronage, as part and parcel of the law of the established kirk of Scotland; and it had, by a series of adjudged cases in the Supreme Ecclesiastical Court, been determined that a call is of the nature of an invitation, which it is desirable the congregation should give for the encouragement of their pastor, and which in practice they are asked to give, but which is not part of ordinary vocation, (that is, of election or of title,) as defined in the book of discipline, nor anywise

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essential to a presentee's induction and settlement minister of a parish.

Whether the right of veto or of peremptory rejection which is given to the male heads of families by the interim act of the general assembly of 1834 and relative regulations, be civil or ecclesiastical, it is wholly beyond the power of the church to confer on the members of congregation, or on any section of them, such power of rejection. The right of nomination to the office of minister of a church and parish is by law vested in the patron, subject to no approval or rejection by the people or congregation, but solely to the power of collation in the church courts, to try and adjudge the qualifications of the presentee.

Assuming that the general assembly had power as a legislative body to make regulations as to the qualifications of presentees, they were not entitled, consistently with the statutes founded on by the respondents, to enact and require that the presentee should be acceptable to the people, as the condition of his being taken upon trials and inducted to the office of minister of particular church and parish, acceptableness not being a quality in the presentee at all, either absolutely and with reference to the duties of a minister in general or relatively as regards the discharge of those duties in the particular parish to which he is presented. Acceptableness per se is not a matter within the province of collation, though the collators may inquire whether the want of it has arisen from a good and sufficient cause. If they give to it any other effect, they delegate to the male heads of families the office which was delegated to themselves, they substitute the choice of the male heads of families for the choice of the patron, and

to the exclusion of others just as capable to judge as the male heads of families thus arbitrarily selected.

The exercise of the right of nomination to the office of minister of a church and parish in Scotland, as well as to the benefice, is reserved and secured by statutes to lay patrons as a condition on the establishment of the national church of Scotland. And when the church courts jure devoluto nominate or call an individual to the office, it is by the exercise of the right of presentation which was in the patron, but which he had failed to exercise, and which in consequence is transferred to the church by a statutory devolution; and the right is then exercised by a deed of presentation flowing from the right of patronage as much as when it is exercised by a lay patron.

The power to give collation upon presentations, that is to say, of examining and admitting ministers to parishes, which is vested in the kirk of Scotland as a national establishment, is statutory in its origin, and defined and limited by statute; and but for the enactments of civil statutes the presentation would have filled the office, the act of ordination alone remaining to the church, but without any power of rejection of an unqualified person. The state conferred the power and imposed the duty of collation on the church, as a check upon the exercise of the right to present to the office, and as the only check consistent with the fair and free exercise of the right of patronage.

The power conferred and the duty imposed on the judicatories of the church by the statutes to judge of the qualifications of presentees, and to decide on objections stated to their qualifications, was one of the leading principles of presbytery; and the power and duty could

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not, consistently with the statute law, either be wholly abandoned by the church courts, or devolved by them in whole or in part, on the congregation, or on any section of them, or on any other body or class of persons; and any claim of right to legislate on any matters, civil or ecclesiastical, which had been the subject of statutory enactment or provision, or to interfere with and affect the provisions of statutes, is inadmissible in point of law.

The church of Scotland established at the reformation was an entirely new ecclesiastical establishment. The state abolished the former established church, and all its powers, authority, and jurisdiction, and then by degrees, and by enacting special statutes to that effect, it formed and adopted another establishment. The statutes are, in Scotland, the sole origin and foundation of the national church as an establishment. The national church received from these statutes certain powers within which it must be confined, while at the same time certain duties were imposed in regard to the right of presentation. Those duties were again confirmed and imposed by the act of Queen Anne, and the established church cannot refuse to discharge them without its presbyteries committing a civil wrong, which is cognizable by the Supreme Civil Court. The church is limited, restrained, and confined as to its own powers and functions in regard to all the matters which form the subject of statutory enactment: Hence the principle recently broached on the part of some of the presbyteries of the church of Scotland,—that it is in the power of the church of Scotland, (that is, the popish [illegible] its errors,—is as inconsistent when

diction of the pope and the nature of presbytery are considered and compared.

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A claim for an inherent power of legislation by an established church so as to destroy, restrain, or impair any civil rights, is inconsistent with any sound constitutional principle applicable to the connexion between the state and established church, and most dangerous to the rights and true liberties of the people of Scotland. And when any such claim is brought forward, it is the duty and province of the Supreme Civil Court to decide on the validity of such pretensions, and to enforce civil rights, and at the same time to restrain all bodies in the country within the limits assigned by law, so as to preserve the civil rights of others: this is clear upon the authorities. There was none to show that the church had the supreme legislative power; but on the contrary, there was authority that if the church courts exceeded their powers they were amenable to the law of the land. Where secular rights are concerned the Court of Session would interfere.

If the analogy of the law of England be resorted to, it would be found that that law was entirely adverse to the pleas of the appellants.

The arguments of counsel having been concluded (23d March 1839),—

Ld. Chancellor's Speech. 23d March 1839.

LORD CHANCELLOR.—My Lords, the great importance of the question which you have now to determine, and the extent of matter which is necessary to be considered before you can safely come to an adjudication in this case, will, I am sure, induce your Lordships to postpone the consideration of it for such a length of time as may be necessary for that purpose; but at the

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same time this is a case which for obvious reasons ou not to remain undecided beyond the period which n be absolutely necessary for the purpose of a due c sideration of it. I would therefore suggest to y Lordships to postpone the consideration of the case the present; but to resume the consideration of it at early a day after the recess as may be consistent w your duly considering it.

Ld. Brougham's Speech.

LORD BROUGHAM.—My Lords, I entirely agree wi my noble and learned and much esteemed friend recommending your Lordships to postpone your d cision in this case, for the purpose of the necessar consideration of it in all its bearings, regard being ha to its extreme importance; and, my Lords, at the sam time I agree, as well for the peace of the church as o the people, we ought not to adjourn so indefinitely th consideration of it as to run the least risk of the decisio of this cause not being finally given before the meetin of the General Assembly of the Church of Scotland.

My Lords, that being the opinion of my noble an learned friend and myself, I shall not at all enter int the merits of the question at present, farther than t say that I regard the question as one of very gre importance, and that I do not see, in any view I c take of the case, any conflict whatever between t rights of patrons on the one hand, and of the church the other, or between the church as an ecclesiastical spiritual body on the one hand, and the flocks on t other,—hardly any conflict between the temporal a the spiritual courts on either side; but that I rega the interests, the views, and the peace of the whole co munity, the church and the laity, the courts spirit al and temporal, as all bound up together, and that in he

decision to which your Lordships may come you will not be giving the balance to one or the other of the conflicting parties, but adjusting it for the common interests and behoof of the whole.

My Lords, it greatly increases the difficulty of this case that not only is there some conflict of authority, — that not only is there very great discrepancy of opinion among some of the most learned and most able judges, who have dealt with the question on either side in the Court below; but that we are in this position; I say it particularly with reference to what last fell from the very able and learned counsel who has just addressed your Lordships in his most able, singularly able, reply, where he alluded to a legislative measure; and something was said upon that also in the Court below, as well as on the other side of the bar by the counsel for the respondent. Now, my Lords, as the peace of the church and of the community is first of all to be considered, I am of this clear opinion, as at present advised, that it will be much better consulted by a judicial determination of the case than by a legislative measure,—that it will be much better and safer dealt with by having a declaration from the high authority of this highest court of law, of what the law is and what it always has been, and what the rights of all parties are under the law as it is and always has been established in Scotland, than by interposing with the strong hand of the supreme legislative power, and by an act of that supreme power making new a law to regulate the conflicting or supposed conflicting rights of the parties. If there is any disposition on any part to fall out with the ultimate decision I am quite sure

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of one thing, that that disposition will be far more likely to be shown to fall out with an act of parliament, with an interposition, as it were, of a legislative nature, than with a judicial declaration of your Lordships, calmly considered, on the case, as if it were a question of science; without regard to conflicting interests, where indeed there is no conflict; without regard to conflicting passions and feelings, of which I am afraid there is considerable, than if it were left to an act of parliament, armed as parliament unquestionably is with supreme authority. My Lords, for this reason, then, I concur with my noble and learned friend and the rest of your Lordships, whose assistance I crave in considering the case. I shall be most happy to hear from them, as I know my noble and learned friend also will what impression the arguments (to which they have given most exemplary attention, as good Scotchmen as well as judges of this High Court,) have made upon their minds, when we apply our minds to the case in judicial point of view for the sake of coming to this, I think, only satisfactory determination of it.

My Lords, it is quite unnecessary to state,—what will be satisfactory to the people of Scotland to know and it is for that reason I state it,—that never was case of importance argued with greater resources and learning and ability than the case we have heard argued at your Lordships bar.

I suppose that the General Assembly meet on the 13th of May.

Mr. Whigham.—The 15th, my Lord.

LORD BROUGHAM.—Then we must give judgment before the 15th; and if I cannot be here I shall

mine and send it to my noble and learned friend. Whether I am present or not I shall consider it my duty to write my judgment.

Judgment deferred.

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LORD BROUGHAM.—My Lords, in rising to state the opinion which I have formed upon this case, I own that I approach the question with very considerable anxiety, —an anxiety occasioned by its vast importance, increased by my knowledge of the deep and universal interest which it excites all over the kingdom of Scotland, and consummated by the very considerable difference of opinion which has prevailed among the learned judges who have decided it in the Court below, —a decision pronounced by very little more than a bare majority of the Court, preceded by very elaborate argument at the bar, accompanied also with very elaborate argument from the bench, and dissented from by no less than five of those learned persons who are among the most distinguished of the Scottish judges.

A circumstance occurs which might at first sight seem rather to relieve me from some part of this anxiety, but which, nevertheless, is in itself a source of considerable uneasiness — a circumstance common to myself and to my noble and learned friend, who is about to give his opinion upon this case. After an unremitting attention for five days to the able and learned arguments on both sides of the bar, I deemed it my duty equally to examine the reasons adduced in the ample discussion which the case received from the Scottish bench, having access to their opinions and their arguments in a shape which it were to be wished we had in all cases of any importance, and the want of

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which it has often been my lot here to complain of, namely, the statement of their own reasoning, I may venture to say so far corrected by themselves as to be given in their own words. These reasons from those thirteen learned judges occupy a volume of nearly five hundred pages closely printed. It may therefore be safely assumed, that there is no one part of this question which has not been visited by all the light which their learning and capacity were fitted to throw upon it; and that we have every thing before us that passed below, as well as all that could be urged before your Lordships here, to enable us to steer our way through the various difficulties, or supposed difficulties of this subject.

Now it does so happen that in a case which has undergone so much discussion below, which has given rise to so great divisions among the judges below, which has been argued on either side at such length both at the bar and on the bench, both in Scotland and here, it does so happen that I have been with the utmost diligence seeking for difficulties, and found them not; that I have been, with all the power which I could bring to bear upon the investigation, wholly unable, and am to this hour unable to discover wherein the very great difficulty consists; and that I have come to my conclusion without any sort of doubt whatsoever resting upon that conclusion, or upon the grounds whereupon it is formed.

Now although this at first sight, as I have already said, may seem to relieve me from the anxiety natural to the position of one who is to decide upon an appeal such as this; yet in another view it rather increases that uneasiness, by making me dread lest matters which have

occurred to others, have been the source of their doubts, and the cause of their divisions, should have escaped me, and lest I may fall into error in exercising the function I am now called upon to perform. But it is a great satisfaction for me to know, and it bears me up completely in the position I am to occupy, that my noble and learned friend and myself have arrived at the same conclusion without any communication whatever upon this subject. From the time when the argument began, during the course of the argument, at the close of the argument, and during the interval that has since the argument elapsed, we have never had the least communication on the subject in any way, direct or indirect, till the last time of your Lordships sitting here, when we agreed to give judgment this morning; and upon that communication we both were found to have arrived at precisely the same conclusion; and I rather think (but my noble and learned friend will be better able to tell you than I am) that we entertain as little hesitation in our judgment the one as the other, being both of us unable to account for the question of law now at issue having been made the subject of such long and pertinacious contest.

My Lords, I say all this without the slightest disrespect to that most learned and venerable tribunal which has judged upon it below; because I know full well that it is of the nature of men, and the more so the more learned, and subtle, and able they are, that in proportion as a case coming before them is of great importance, and occupies the minds of the people by whom they are surrounded,—it is of the nature of men, and even of judges in such circumstances sometimes, rather to overdo the matter; and perhaps it is the safest

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side upon which to err, because at all events it betokens their attention bestowed upon the subject, and it precludes the possibility of a hasty or unwary decision.

And now, before proceeding to state the grounds upon which, in my opinion, there can be no doubt whatever that the Court below have come to a right conclusion, and that their judgment should be affirmed here by your Lordships, I will take notice of a topic which we have heard more than once, and in more shapes than one urged at the bar. It was adverted to below; it was adverted to even in the judgments that have been pronounced; and I cannot withdraw from taking notice of it here. In reference to the great anxiety which this case excites in Scotland, and to the possible consequences of an affirmance of the judgment, much has been said of the public feeling in two forms, the feeling of the flock and the feeling of the pastor. With respect to the flock, I have no reason whatever to doubt, I am not permitted to doubt, that they will render a respectful obedience to the law of the land: but if I have no reason to doubt of this respecting the laity, how much less dare I question it with respect to the ministers of the gospel? To menace a tribunal with any disrespectful reception of its lawful decrees from the laity of the land is hardly conceivable; but to menace it with any disrespectful reception of a sentence pronounced by the judges of the land, to menace such lawless conduct on the part of the clergy, of the christian clergy of a christian church, the church of Scotland, whose head is Christ Himself, is not only indecorous, but it is preposterous, it is monstrous: will not believe it till I see the fact,—a fact which hope I shall not live to see, and which I hope no on

else will live to see, of the church of Scotland refusing to yield a willing as well as a respectful obedience to the lawful decision of the highest court of judicature in the realm, the court whose office it is to pronounce the law of that realm. It is for me to add, that if it were as certain the other way, still the law must take its course. If it were just as clear that the judgment we are about to give would be resisted, as I know it to be demonstrably certain that it will be cheerfully obeyed, still it is the office of your Lordships to pronounce your opinion upon the question of law brought before you; and you would betray your duty most grossly if you were to suffer yourselves to be diverted from pursuing the course of your duty by any fear of other persons still more scandalously betraying their duty both as ministers and as subjects, and still more flagrantly violating the law.

I will now proceed to state the reason upon which I have come to a conclusion in favour of the judgment under appeal. They are short and satisfactory to my mind. They consist in reference to the statute law of the country, and they leave upon my mind no doubt whatever, unless we are to allow niceties drawn from antiquarian lore, subtleties gathered from disputed points of church history, refinements borrowed from the controversies among theologians of past ages and metaphysical distinctions and arguments ab inconvenienti, and misconceived notions with respect to the bounds and limits of jurisdictions to pervert the plain intendment of statute law, that intendment which is to be gathered from the words of the legislature, which is confirmed by the reason of the thing, which is established above all by the manifest purpose of the enact-

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ment, as declared by the law-givers themselves, and which is ultimately clenched, as it were, and made fixed and sure by comparison with other branches, other principles, and other provisions of the law itself.

Now, my Lords, when I go at all, after what I have said, into the historical matter belonging to, or rather, perhaps, brought into and made to encumber this case, and much of which is more curious than useful in the argument, your Lordships will presently perceive it is with a view of helping out the construction to which I am coming, and for no other purpose. I shall, therefore, for a moment look to what was the original interposition of the people in question of presentment and induction into benefices, and then I find that at no time, even when the rights of patronage were the least known, and therefore the worst secured, at no time did the people's share in the operation bear the least resemblance to what is contended for in the present case.

But, first of all, it is certainly convenient and satisfactory to find that we have no dispute whatever here relating to the facts: Lord Kinnoull's undoubted right to the advowson, or the patronage of the living, is clear; his having presented Mr. Robert Young to that living is clear. The presentment having by the presbytery been received within due time is admitted; it having been sustained, as they are pleased to call it, is admitted also. What effect that sustentation has had, or what use or purpose it has served, is another question. The refusal afterwards of the presbytery to ordain and induct Mr. Young to the living is admitted; and, in the sixth place, the ground of that refusal (and this is most important) is distinctly admitted; it forms the whole subject matter of the controversy, and I shall now call

your attention to the statement of it upon the record in the eleventh article of the condescendence, and the answer of the presbytery. The allegation in the condescendence is this:—"The aforesaid sentence, whereby "the presbytery rejected Mr. Robert Young as presentee "to the church of the parish of Auchterarder, proceeded "exclusively on the ground of the veto,"—a new word introduced, I apprehend, into the Scottish law; but a translation of it is given in the same sentence,—"on "the ground of the veto, or dissent,"—a most important word,—"or dissent exercised by the alleged "majority of heads of families or parishioners of Auch-"terarder." Such is the allegation. The answer is, "admitted." Thus, therefore, it is clear that there is raised before your Lordships the question, Have the majority, or the alleged majority (an allegation not traversed) of the heads of families, of any families, the right to exercise a veto or dissent (I prefer the English translation to the Latin original, a dissent)? and is the presbytery bound by that dissent, unaccompanied with any reasons, and not followed by any inquiry on their part into the validity of the causes of dissent, to reject the patron's presentee? In other words, Is the patron's right of presenting subject to the acceptance or refusal, that is, the choice of the congregation? That is the question, and the important question raised before your Lordships; that is to say, is or is not, by the law of Scotland, the right of patronage in the patron, or is it in the patron conjointly and concurrently with and shared by the parish as well as the patron? That is the question raised by force of the word "dissent;" for it is a mere refusal of assent; it is a choice negative exercised by one party after a choice affirmative exer-

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cised by the other, neither party being bound to assign any reason other than his mere will.

My Lords, I come, therefore, to observe upon what has at different times been the right of the parish or the congregation, even in times when the right of the patron was most feeble and worst ascertained. Let us see what right have they in point of fact, and by practice or usage enjoyed.

Now it is to be observed that before endowments were numerous, when there were very few patrons to present, when all that the church consisted of was a number of congregations, and when the provision for the parson or the priest was feeble as the church itself, when he was paid accidentally, by casual offerings, by various fees from time to time increased by clerical encroachments, but when there was no provision regularly made by formal and substantial endowment, it is clear that the right of patronage could hardly be known; and as the priest must be chosen by somebody, it appears that he was then chosen, not by the congregation who were to be his scholars, not his patrons, but he was chosen by the clergy, by the clerical portion of the church. For your Lordships will find that there was a canon in the year 428 referred to by one of the learned judges, which shows that the election was in the clergy, though with the assent of the congregation. "Plebis,"[1] says the canon, "non est eligere, sed est electioni consentire." That is, all the function of the people. The clergy chose, the people assented; and this in 493 was extended to bishops; for it is then laid down by another canon, "in electione episcopi populus debet adesse;" just as in the enthronement of the king, which has been

[1] Van Espen. II. t. 9. c. 9.

originally the actual choice of soldiers of their imperator or emperor in ruder ages, beyond the period of authentic history. Long after that election had been disused, there continued the remnant of it, which we have at coronations up to this hour, by asking the people's assent as a form. The people may here be said to be adesse, for they are called upon to give their assent, though the coronation, the enthronement, the allegiance, and the prerogative would have been just the same if they refused as if they gave their assent, and would have been just the same if their assent had never been asked.

Then, in a work which is deemed a great authority among the fathers, I mean Cyprian's letter to the Spanish people, we find it written that no one should "be ordained but in the presence of the people." Now, why? The reason is given, and it throws light upon the call; for I take the call to be a sort of remnant of this popular presence. The nature of the call is exceedingly ill defined, and its history is admitted on all hands to be very obscure, as far as it ever existed in any thing like a substantive shape, (except at one period, when patronage was avowedly abolished by law;) it is now put down by law, as I shall show in a further part of my argument. But its nature seems to be illustrated by the reason which Cyprian assigns for the presence of the people at ordinations:—"No one "should be ordained," (it is rather an advice or a recommendation than a law, or a construction put upon a law,) "no one should be ordained but in the presence "of the people, to the end that the demerits of the bad "may be disclosed and the merits of the good pro-"claimed." An opportunity was to be given for showing whether the life and conversation were good

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or bad; because that tended to inform the conscienc of the bishop, who was to ordain the clerk, and tha tends, in presbyterian government, to inform the con science of the presbytery, who are to judge, as I shal presently show, and only to judge of the candidate' qualifications, the life and conversation being one o those clerical qualifications. It was for the purpose o informing the party who was to decide, that he migh inquire, and upon inquiry might determine.

Then there is in 493 a rescript of Gelasius, whicl states that the right of rejection does not exist at all i people; for it expressly says, "if their objections ar "groundless," which implies giving a reason, and im plies no veto, no dissent; dissent is a mere refusal But this must have been grounded upon reasons; be cause he says that those reasons are to be submitted t the clergy, and if groundless the clergy are to remov them by admonition, and thereby to compel an assent Does not that clearly show, that if the reasons, in th opinion of the clergy, were groundless, the clergy were to proceed as if there had been no dissent; and to deem a dissent founded upon bad reasons, or upon no reason at all, as of no force at all?

Then in the year 886 Pope Stephen says, referring distinctly to the same subject, "docendus est populus, non sequendus;"[1] a very pontifical doctrine, no doubt, and one which by most pontiffs was very amply and very accurately practised, together with another principle as religiously acted upon, namely, that the flock were to be fleeced as well as taught; that, however, belongs to the papal and, God knows, not at all to the presbyterian church.

[1] 1 Dec. Dist. 63.

Now, what says Bœhmer, in a book which is of great authority,—authority in foreign countries as well as among the canonists of our own; I mean his Jus Parochiale? It is cited by one of the learned judges.[1] He says[2], "patrono votum decisivum in electione tribuatur." Now see the difference between the patronus and the populus:—"Populo negativum, ut possint dissentire." But how? Not as the Auchterarder people have done, and as the presbytery have allowed them to do, merely to dissent without reason, and with nobody to judge of the reason:—"Non tamen aliter quam si justas dissen-"sus causas allegare queant." They must not only dissent and give their reasons; but their dissent must be grounded upon such just reasons as they "allegare "queant," that is, as they are able truly to allege. Then the question is, who is to decide upon the justice of those reasons? and that question is best answered by coming to the point now in contest between the parties. How has the Scotch law determined that those reasons shall be examined and decided upon? We are thus led to what is certainly the very pinch of this case, and which, in the view I take of it, makes decisively against the appellants; for I now come to the statute law of Scotland, upon which the whole controversy must ultimately depend. Let us first go to the original act, regulating the presbyterian scheme, the act 1592, chapter 116. After providing for the exercise of the judicial and administrative functions of the various church judicatories in Scotland, it concludes in these words:—"Ordains all presentations to benefices to be "direct to the particular presbyteries in all time coming,

[1] Lord Corehouse.

[2] Jus Paroch. iii. 1. 18; Jus Eccles. prot. iii. sec. 77. & 78.

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"with full power to give collation thereupon, and to put
"order to all matters and causes ecclesiastical within their
"bounds according to the discipline of the kirk, pro-
"viding the foresaid presbyteries be bound and astricted
"to receive and admit quhat-somever qualified minister
"presented by his Majesty or laick patrons." So that they were bound and astricted by the force of this statute to admit, and if they did not admit they broke the law; they acted illegally, and were liable to the consequences, civil and other, of disobeying the clear and positive order of a statute to receive and admit whoever was presented by a lay patron, if duly qualified; they were only to judge of his qualification, and if qualified they were bound and astricted, that is, they were ordered by the law, to admit him. It was at their peril, quoad civilem effectum, and also quoad alios effectus, that they refused to obey the positive mandate of the King and the estates of parliament.

At different times doubts were entertained whether the law ought to be continued, and some fluctuation existed even in the practice under it in one or other of the troublous periods of Scotch church history. Nevertheless it was not till the year 1690 that the legislature itself made any even apparent alteration of the statute, there having been an act passed immediately upon the revolution, the act of 1690, chapter 5, which revives, renews, and confirms the act of 1592, with the one exception of that part of it that I have just read relating to patronages, and states that this matter is hereafter to be taken into consideration; and in performance of that promise, and in compliance, as it were, with that legislative notice, came in the same year the 23d chapter, which it is most material, therefore, that I should now bring under the view of your Lordships.

It is entitled "An act concerning patronages," and it undoubtedly introduced, for the first time, a total change in the law of patronage. It abolished the right of patrons, and indeed radically extirpated patronage; it professed to do no less. It did not proceed, as some would have done, by a side wind, professing to do one thing and doing another, but it honestly, openly, and manfully avowed, in a spirit worthy of men the legitimate successors of the covenanters, and who had just brought about the revolution of 1688 in Scotland,—it avowed that nothing less was intended than to root out patronage from the land. This famous statute, therefore, begins by pronouncing the doom of patronage; and it gives the cause of the doom, namely, the crimes of the offenders:—"Our sovereign Lord and Lady, &c., "considering that the power of presenting ministers to "vacant churches of late exercised by patrons hath "been greatly abused, and is inconvenient to be con-"tinued in this realm." The sentence has thus gone forth against patrons, and whatever is done after this preamble must be taken to be in execution of this judgment for the offence, namely, the abuse and inconvenience ascribed to the right of patronage; the sentence is neither more nor less than utterly abolishing that right for that cause. Now this is most effectually done; but it is material to consider how it is done, and what is substituted in place of it; because one part of the argument, and the greater part of it, is a falling back from the act of 1711 (the 10th of Anne) upon the act of 1690, in a way and by a process of reasoning which I marvel at,—the more I read the more I wonder at, and upon which I shall presently have to say somewhat to your Lordships. The act proceeds, "that in

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" case of the vacancy of any particular church, and
" supplying the same with a minister, the heritors
" the said parish, (being protestants,) and the elders
" the said parish are to name and propose the pers
" to the whole congregation, to be either approv
" or disapproven by them." The process therefore clear; it is not the people, it is not the congregatic who are to call; but it is a very select portion; it m be five people, it may be four people, there may be t one heritor and three elders, and these are constitutec kind of corporate body; for what purpose? for t purpose of presenting to the people.

Then the presentation is hereby taken from t patrons, because they have abused it, and because it v found inconvenient; and it is transferred to this n body, the heritors and elders, who are to present to congregation. If the congregation disapprove, the a approvers are to do what? to exercise a veto? to g their dissent, as the second article of the condescende states and the answer to it admits, and as the pres teries state to be their sole reason for not admitt Mr. Robert Young? No such thing; the "disapprove are "to give in their reasons;" just as the canon of 4 just as the canon of 493, just as the rescript of 493, a as Pope Stephen's rescript of 886, and as Bœhmer's a thority with respect to these old times states to have b the church law even then. Now what is to be done u the reasons, and why are they to give them? "
" the effect the affair may be cognosced upon by
" presbytery of the bounds, at whose judgment a
" by whose determination the calling and entry c
" particular minister is to be ordered and concluded
Now I pray your Lordships to stop here, and to f

a clear idea, (for it is most important to the subsequent part of my argument,)—to form a clear idea of what the scheme is of presentment and admission which is laid down by this important statute. Patronage was to be abolished. It had sinned in two ways: first, by its abuse, and secondly, by its inconvenience; therefore it was to be extinguished, and another process of election to be substituted in its room. Then what is this process? The heritor or heritors and elders are to present to the congregation, and the congregation are either to say that they approve, or that they disapprove. If they disapprove, they are to give their reasons; those reasons are to be decided upon, not, certainly, by the heritors and elders, but by the presbytery of the bounds, and by the presbytery of the bounds cognoscing, that is to say, judicially examining, the truth and sufficiency of those reasons. Here, as in all cases of judicial examination, two things may happen: the presbytery may either demur, as it were, and deny the relevancy of the grounds stated by the congregation; they may say, if all these things are true they are no objection to the admission; or the presbytery may go to issue upon the fact. They may say it is true; that if the statement of facts be well grounded, it forms a sufficient cause for our rejection; but the fact is denied or is doubted. Inquire as to the fact. If upon both of those inquiries they find that the congregation is right, then, the reasons being well founded in fact and law, the presbytery are to reject the party presented. If either inquiry proves against the congregation, if either the facts amount, in the judgment of the presbytery, to no disqualification, or if the statement of fact be found untrue, then the presbytery are to reject, not the can-

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didate, but the reasons of the congregation, and admit and induct the presentee. So that here completely new form of proceeding instituted for first time in Scotland; an abolition of the righ patronage, and a transfer of that right to the heri and elders, who are to name and propose a person tc whole congregation, who, if they disapprove, shall mit their reasons to the judgment and determinatio the presbytery; and all those parties combining, operation is completed one way or another: either presentee of the heritors and Kirk Session is rejec or their presentee is admitted, and obtains possessio the cure.

My Lords, keeping the provision of the act of 1 steadily in view, let us see what next took place. this had continued the law of the land, if this sta had been left unrepealed, no man could have said Lord Kinnoull, or any other patron, had the righ presentation. It was abolished; it was avowed tc abolished. The reason of the abolition was given transfer was made, and the party was indicated to wl the transfer, as the substitute of the patron, was effe by the act. But if this is true, another thing is equ true, that nothing like the present arrangement, down by the general assembly and followed by presbytery, would have arisen under that law. T argument is something wholly different: it is no sentment to the congregation by the heritors and K Session; it is no refusal upon reasons given in by congregation; it is no cognoscing and adjudicatior the presbytery; but it is a totally different proceed invented for the first time in the year of grace 18 and which at the revolution of 1690 was no m

dreamt of than it was in the reign of James the Sixth, in the year 1592. It is a totally different process, not in the slightest degree resembling the other, so that if we are driven back in the argument from the statute of Anne, to which I am now coming, and are to fall back upon the statute of William and Mary, we are then no doubt driven away from the right of patronage, and the act of Anne is repealed, (though only by our misconstruction of it, and not by the legislature.) But we do not fall back upon the present proceeding of the Auchterarder presbytery, or anything like it; we fall back upon a totally different state of things, namely, patronages transferred from the patron to the heritors and Kirk Session, and reasons to be given for dissent by the congregation, and those reasons to be adjudicated upon after being cognosced by the presbytery; which is a thing as different from what has been done upon the present occasion as can well be imagined. Therefore let us see now what was done, and why it was done, by the act of Anne in the year 1711: I must here say, that, with all the respect and reverence which I habitually feel for the authors of the revolution both in England and Scotland, if they had never done anything wiser, or anything more just or more considerate, than they did in passing the act of 1690, chapter 23, I should not have thought them entitled to all the veneration with which we are wont almost instinctively to mention their names. I cannot conceive anything more strikingly different from the conduct of the Somerses, the Godolphins, and the other great men who brought about the revolution in this country, whose conduct in all particulars, civil and ecclesiastical, was marked by the most careful, and delicate, and cautious dealing with all

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existing constitutional positive rights, all vested inter
I can conceive nothing more widely different from
spirit that presided over all the proceedings of t
great men than this act of the Scotch estates in pa
ment assembled; for upon a vague and general
gation of abuse and inconvenience, it takes away
rights of the lay patrons; it gives them no opportu
of defending themselves against the one charge or arg
against the other; and it then admits, in express te
that they have a valuable right of property, becau
professes to give them a compensation: 600 merks S
were given, equal to about 33*l.* sterling. And b
observed, that this very hasty, rude, and ill-worded
vision gave the same compensation for all advows
whatever might be the difference in their value. It
therefore, a very great encroachment, very hastily
violently made, upon the rights of private property,
existence of which it admitted, while it gave not
that could be called equivalent in return for wha
confiscated. But after twenty-one years of this
scheme, then comes the statute of Anne in 1711,
its reasons are given in the preamble:—"Whereas
"the ancient laws and constitutions of that part
"Great Britain called Scotland the presenting
"ministers to vacant churches did of right belon
"the patrons, until by the act of 1690 the pre
"tations were taken from the patrons and given to
"heritors and elders of the respective parishes; an
"place of the right of presentation the heritors
"life-renters of every parish were to pay to the res
"tive patrons a small and inconsiderable sum of mon
"and whereas by the fifteenth act of the fifth sess
"and by the thirteenth act of the sixth session, the

"entitled 'An act for encouraging of preachers at "vacant churches be-Northforth,' and the other "entitled 'An act in favour of preachers be-North-"forth,' there are several burthens imposed upon "vacant stipends, to the prejudice of the patron's right "of disposing thereof: and whereas that way of calling "ministers has proved inconvenient." Here they adopt a very opposite mode of reasoning ab inconvenienti, which, although no argument in construing a statute or expounding a law, is an admirable reason for making a law, or for repealing one already made, and for altering a practice tried by experience, especially as that practice was only twenty-one years old, "and "has not only occasioned great heats and divisions "amongst those who by the aforesaid act were entitled "and authorized to call ministers, but likewise has been "a great hardship upon the patrons whose predecessors "had founded and endowed those churches, and who "have not received payment or satisfaction for their right "of patronage from the heritors or life-renters, nor have "granted renunciation of their rights on that account." For these reasons (and stronger can hardly be conceived), first, because an uncompensated violation of private property had been committed,—an interference with a valuable estate without compensation; secondly, because great inconvenience had been occasioned by causing heats and animosities in the exercise of the new right in the new hands, to which it had been transferred from the lawful owners: for these very sufficient reasons the act proceeds immediately to "repeal and make void" the said act of 1690, c. 23. concerning patronage.

That act is therefore, by the statute of Anne, completely repealed and abrogated, and it from thenceforward ceased to exist, just as much as if it had never

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been enacted at all. Then, in order that there mig be no doubt when that act was repealed, or what t law existing before 1690 was, a declaratory cla follows:—"that in all time coming the right of all a "every patron or patrons to the presentation of min "ters to churches and benefices, and the disposing "the vacant stipends for pious uses within the par "be restored, settled, and confirmed to them, t "aforesaid acts or any custom to the contrary "anywise notwithstanding; and that from and af "the first day of May 1712 it shall be lawful for h "Majesty, her heirs and successors, and for eve "other person or persons who have right to a "patronage, to present a qualified minister or minist "to any church or churches whereof they are patr "which shall at any time after the said first day "May happen to be vacant; and the presbytery of t "respective bounds shall and is hereby obliged "receive and admit in the same manner such qualifi "person or persons, minister or ministers as shall "presented by the respective patrons, as the pers "or ministers presented before the making of this "ought to have been admitted."

Now, if the act had stood without this last proviso to the manner of inducting, no doubt whatever co have existed in any man's mind upon the state of t law which is to regulate this question; for you wo then have had the act of 1690 abrogated altogeth you would have had the right of the heritors and eld to present to the people, and the people to dissent u reason, and the presbytery to cognosce those reaso and adjudicate thereupon, entirely repealed, as much if it had never been bestowed upon the parties. It o existed for twenty-one years, and this act would h

repealed it at the end of the twenty-one years. You would then have had a declaration, or a statutory enactment, in 1711, that all patrons had a right to present, and that all qualified persons by them so presented, that is to say, all persons who had the due qualification, without any other condition whatever, should at once be invested with the living. That would have been the clear, undeniable, unquestionable law of the land, had not these words which I have last read been adjected in the form of a proviso or a regulation. This argument, then, will turn upon the force and effect of those words; and therefore two points are raised upon this act, and upon those two I am now about to give my opinion, with the reasons of that opinion. The first question is, what was meant by "qualified person?" and the other question is, how far this repeal of the former act and the revival of patronage is qualified or restricted, or in any manner of way modified, by the reference therein made to the manner of inducting persons observed before the making of the act. These are the two points material to be considered, which are raised upon the construction of this statute; and I address myself to them in their order.

First, with respect to qualification. I am somewhat surprised to find, in the very able and learned arguments from the bench below, an attempt to show that "qualification" is of such extensive meaning, that within its scope may be brought the whole of the matter at present in dispute, namely, the acceptableness and reception of the party presented by the congregation, as finding favour in their sight. Much ingenuity is displayed by several of those learned judges, for some of whom I have the greatest respect, whose subtlety I know to be unbounded, and the fertility of whose ima-

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gination in dealing with questions I know to have limits. That subtlety, and ingenuity, and fancy think are shown in endeavouring to give this wid comprehensive sense to the term "qualification." was said Dr. Parr might have been a very able div in England, and a most learned man in the church, s yet very unfit to teach the parish of Auchterard Such eminent men will do in one place,—in Glasg or Edinburgh; but they will be thrown away entir when they are sent to waste their gifts in the desert of some Scotch mountainous or insular parish. It justly said, indeed, that a man is not fit to teach th who does not speak their language. But such a m cannot be called a qualified person. Language is o essential part of qualification; it belongs to literatu though it is the simple portion of letters. If a m knew Greek and Hebrew, and did not know the moth tongue he was to preach in, I should say he was min sufficiens in literatura, and so not a qualified pers But we have here no question of literary qualificatio the question alleged to come under the larger sense the word is that of acceptable or not acceptable to t flock; and to bring this within the meaning of "qua "fied" is the attempt of these expounders of the s A man, say they, may be of such rude and st manners, he may be so disagreeable in his habits life, or he may be so much above his flock in manners, and so entirely disqualified for associating wi them, that they will receive no edification from ministration. My Lords, if it amount to anyth affecting his morals, his life, and conversation, comes, no doubt, within the meaning of "qualifie but if it is merely that they do not like him as well they might, that they prefer another to him, that

do not fancy him so much as it is to be wished they did, the law has affixed to the word "qualified" no such meaning as that. It is quite clear that it is a violent strain upon the law to impute to it such a meaning.

But I do not rest my position upon argument alone; I am going to show your Lordships that no such meaning can possibly by the law of Scotland be given to the word "qualified." It is a technical word in this question; it is not the word "qualified" used in its general sense, as you talk of a man's qualities, of his capacity, of his abilities, of his merits, which are all general phrases, and none of them technical and defined. The word "qualified" is as much a known word of the law, and has as much a technical sense imposed upon it by the statutes, by the law authorities, by the opinions of commentators, by the dicta of judges, as the word "qualification" has when used to express the right to kill game, or when used to express a right to vote in the election of a member of parliament. It is perfectly technical, and it is an understood technical expression.

I now go to the most venerable of all authorities in the law of Scotland because the most ancient, the Regiam Majestatem; and I am the more induced to resort thereto, that it is brought from a period when the right of patronage was weaker than it has been since, when the rights of advowsons were not understood as thoroughly as they have subsequently been, and before the legislature had ever exercised its discretion upon the subject, or made any enactment touching those rights. I the more go to the Regiam Majestatem for this further reason, that it is of high authority in the English law. At one time it was doubted among legal

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antiquaries whether it was a Scotch or an English book and it was said, with the usual national feeling of our Scotch fellow subjects, that it was a Scotch work originally, and had been transferred and adopted by an English lawyer; but I believe all men now admit that it was originally an English book,—that the original work is our Bracton, whose book was adopted in Scotland. This circumstance shows that the law of the two countries was nearly if not precisely the same in those remote ages, how widely soever they may differ now.

The Regiam Majestatem, buke 1. c. 2. s. 3., has these important words:—"Ane laick patron sould be "ware that quhen ane kirk or vicarage sall happen to "vaik," (that is, to be vacant,) "that he present thereto "ane worthie man qualified." How? by being acceptable to the people from his eloquence, or from his manner of demeaning himself in society? No such thing,— "qualified in literature, life, and manners" (that is, morals), "within foure months after that he knows the "kirk to be vacant, that be the longer delay of the "presentation he prejudge nocht himselfe." The law is assumed as clear, and the only object of this passage is to prescribe the time beyond which the patron's right may lapse. To prevent this it says, let him take care to present within four months. Now what does he do? He is to present a qualified person. How is he to be qualified? In literature, life, and manners. All the qualification, then, imposed upon him which there is the necessity of looking to is this, that the party presented has sufficient literature, a pure life, and godly manners.

The same is the doctrine laid down in all the most venerable commentators; and I do not now quote Bankton, for two reasons; first, because he is much

more modern; and secondly, because a most learned judge, for whom I have the most constant and inviolable respect, even when I most differ from him, I mean Lord Moncreiff, throws a doubt upon the authority of Bankton, as if his opinion were of no great weight generally, which I own surprised me. It was new to me; I always understood that his authority had risen of late years very much in our courts; such was the language at the bar during the time of Lord Eldon, during the time of my noble and learned friend who succeeded him, and during my own time. But, however, Lord Moncreiff is a very high authority; and what he has said will lead me, as often as Bankton is quoted, to reconsider this matter. But his Lordship also says he is peculiarly of less authority upon a question of this nature, because it is well known that he had taken a strong part upon the church patronage question. Therefore I do not quote Bankton at all. But Balfour[1] I cite; and in his Practicks he lays it down thus: "Ane "laique patron of ony kirk or benefice vaikand sould "present thairto ane qualifyit and habil persoune of "sufficient literature, honest in life, of gude maneris." That exactly corresponds with the words in the Regiam Majestatem, which says, "qualified in literature, life, "and manners."

Therefore I take it to be clearly established by these authorities, and I know of nothing which does not confirm it, in any of the dicta of judges, or the decision either of the ecclesiastical or the municipal courts, that "qualification" is a technical word, meaning suffi-

[1] Balfour's Practicks, p. 501; "Anent advocatioun and patronage of kirkes."

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ciency in literature and honest life, as Balfour has i and of good manners, meaning thereby good morals and no one is more ready to admit at once than I ar that upon cognoscing this matter, as the statute 1690 expresses it, if objection to the literature, to t life, to the morals, be made, the presbytery, the Ki Court, with an appeal to the synod and an ultima appeal to the assembly, are the judges of his qualific tions in those respects. But I also venture to assert as a thing equally clear, that his being acceptable not upon other grounds not even stated by the parish,- their saying they do not like him, they have an aversi to him, they prefer any other to him, he is the man all the world they do not wish to have among them, may be stating a thing very much to be lamented, m be a thing very fit to be submitted for the considerati of the patron, may prove it to be exceedingly unfor- nate that a man the object of such prejudice, howe- groundless, should be forced upon the people as th pastor; but is nothing like a defect in the perso qualifications, and is nothing of which the law will t any kind of cognizance. I would, however, add passing, that I cannot admit at all even the strong prejudice universally entertained against a presentee be decisive that the patron was wrong and the peo right. I cannot assume that because he is even una mously rejected by the people at the time of his pres tation, he might not afterwards turn out a very pastor for them; because we know of instances in whi if that had been held a sufficient objection, some of t greatest ornaments of the church of Scotland ne would have filled the pulpit for one single hour af their nomination; and if I mention the truly venera

name of Dr. Reid, one of the most eminent philosophers that any country in any age ever produced, I at once recall to the recollection of such of your Lordships as are connected with Scotland, a remarkable instance of what I am now stating. He never would have been minister of the parish of New Machar in the county of Aberdeen, if the strongest and unanimous objection of the people had been reckoned decisive. He was settled there by main force,—I believe by the military, and against the strongly-expressed united will of the people; and yet he became, before many months had passed by, one of the best beloved ministers that ever officiated at the altars of his country. But be that as it may, and suppose we admit it to be deniable that a harmonious settlement should always take place, this is a totally different consideration from the question of right. The law is not so; the word "qualified" does not mean that,—it does not comprise the qualification of popular favour. The word "qualified" means something else; it means a qualification in literature, life, and morals, to be judged of by the presbytery; and no one talks of interfering with that right of so judging by them.

Now we will just refer for a moment to some stress that has been put by the learned judges, as well as by others, upon the word "qualification," from a desire to extend its scope over other things as well as learning and life. The two books of discipline are well known to your Lordships,—Knox's book, first in 1560, and the second book in 1578. Now these authorities, as they have been strangely called, undoubtedly assert an election by the people in so many words; they do not merely touch a right of rejection; they do not confine themselves to veto; they do not mention assent or dis-

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sent with or without reason; but they go a great d
further. What does Knox say in his book? Elect
is here asserted in plain terms:—"It pertaineth
"the people to every such congregation to e
"their minister." That is not contended for nc
that is claiming for the people a right not merel
reject or to accept, but to choose originally,—to pre
as patrons to the presbytery. That is the doctrin
this book, but that never was received for law in S
land; and the first book of discipline is of no l
authority at all. The second book of discipline in
manner says: "The liberty of election of persons ca
"to ecclesiastical functions, and observed without in
"ruption so long as the kirk was not corrupted
"antichrist, we desire to be restored, so that men
"not intruded upon any congregation, either by
"prince or any other inferior person, without la
"election and the assent of the people over whom
"parson is placed, as the practice of the apostolic
"primitive kirk and good order craves." Now,
were called to a conflict with the book of discipline u
any point of church discipline, or upon any artic
theology, I should, no doubt, feel great anxiety
much distrust of my own opinion; but I do not
the same anxiety and the same distrust if I con
with it upon a matter of historical fact,—if I g
issue with it upon a gross violation of histo
truth, which I think I am justified in asserting
what I have already read to your Lordships from
history of the church and from the statutory rec
themselves. Can any man breathing say that an
tion by the people of their pastor was the practice i
times until antichrist corrupted the church,—until

time when antichrist entered to despoil the vineyard of the Lord, as this book states? No date is given, no period assigned for this trespass, this breaking and entering the vineyard, so that the statement is much less easily refuted by the generality: Dolus versatur in generalibus. Hence I know not that it is an honest statement of facts; it is probably more zealous than honest, but at all events it is more zealous than true. But can any man point out the time when it ever was the practice to have a free election of the pastor? because this is not merely an assent about which something might be said; it is not a call, whatever that may mean; but it is an assertion that the people had at all times the right of choosing their own minister (and it says nothing whatever of the patron, any more than if there had never been such a thing as a patron in existence) until antichrist entered the vineyard. Now, I aver that this is not true; it is not correct in point of fact; it is the very reverse of the known admitted fact.

I will next advert to the act of 1567[1], which throws some light upon the subject. Considerably before the time when the second book of discipline denies that patronage ever existed,—before popery came in, the presentation of lay patrons is expressly reserved to the just and ancient patrons in so many words. Now it must be admitted that this enactment was after the first book of discipline in 1560. But the book of discipline in 1578, twelve years after the act of parliament which I am about to read, mis-states the fact in the face of that act of parliament, as grossly as a fact was ever mis-

[1] Cap. 7.

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represented for any purpose. The act of 1567 say "the presentation of laic patronages always reserv "to the just and auncient patrones." But the book discipline in 1578 says that in point of fact the ju and ancient patrons had no existence, for that un antichrist took the field it was the people who elect and not the just and ancient patrons at all. The proceeds to say:—"And that the patron present a "qualified person, within six months (after it may co "to his knowledge of the decease of him who bruik "the benefice of before,) to the superintendent of th "parts where the benefice lies, or others having co "mission of the kirk to that effect, otherwise the ki "to have power to dispone the same to ane qualifi "person for that time; providing that in case the patr "present ane person qualified to his understanding, a "failing of ane, ane other within the said six montl "and the said superintendent or commissioner of t "kirk refuses to receive and admit the person present "by the patron as said is, it shall be lesum to t "patron to appeal to the superintendent and minist "of that province where the benefice lies, and des "the person presented to be admitted; which if th "refuse, to appeal to the general assembly of this ha "realm, by whom the cause being decided shall ta "end as they decern and declare."

Now it is inferred from this that the matter beco a question of exclusive ecclesiastical cognizance, that the decision of the general assembly, the hig church court, is to be final and conclusive upon i force of the words "take end as they decern." To sure the matter is to take end as they decern; upon what are they to decern, and what is to take e

The question of qualified or not qualified; if the presbytery and assembly refuse to admit a qualified person, not denying his qualification; if there is a competition of two qualified persons; if A., claiming the right of advowson, presents one, and B., claiming also the right of advowson, presents another, and the church courts take the wrong one, and nobody contend that this is a question for the final adjudication of the general assembly, it is for the final adjudication of the civil courts of the realm, according to the uniform and uninterrupted current of all the decisions; for I may observe in passing, that though those decisions are not fruitful of instruction for the present question, though no one of them is to be found which disposes of the arguments, though in no one case to which they relate has the present question ever been raised, yet they are very fruitful with reference to other questions, and are very important as showing the bounds of the civil and ecclesiastical jurisdictions of Scotland. They are numerous and they are clear touching the decision of questions as to who has the right of advowson where there is a competition of presenters; and in that case it is not the church court that decides the right, any more than it is the convocation in England that decides the right; it is the civil or municipal court, not the court christian,—the temporal court here, the court of the King by quare impedit or quare non admisit, or an assize of darrein presentment; not the spiritual court of the Bishop. The statute of 1567 undoubtedly gives an exclusive jurisdiction upon the question of qualification to the presbytery coming in place of the superintendent or bishop, or assembly's commissioner; and it may go by appeal from the presbytery or the

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superintendent to the general assembly of the who[illegible] kirk, whose jurisdiction is exclusive upon the poi[illegible] That their sentence has this virtue and force on su[illegible] questions no doubt whatever exists; for I have explici[illegible] stated that no one denies the cognizance of the cou[illegible] ecclesiastical upon qualification.

Having disposed, therefore, of the first of the [illegible] points which arise upon the statute of Anne, the fo[illegible] dation of the whole question before us, and hav[illegible] shown that the term "qualified" used in that stat[illegible] does not mean general acceptableness to the cong[illegible] gation (which would be vesting the choice in the co[illegible] gregation, and not in the patron), contrary to t[illegible] express words of the act, I now come to the seco[illegible] point raised, and by which it is attempted to show th[illegible] the statute leaves the mode of presentment and indu[illegible] tion precisely where it stood before, that is to say, i[illegible] the interval between the year 1690 and the year 1711. If the argument does not confine itself to those twenty-one years it is nought, it proves absolutely nothing; for if it goes back to the period before 1690 it goes to the state of things under the act in 1592, which says that the presbytery are bound and astricted to receive whatever qualified person the patron shall present. Then those of the learned judges who so construe the statute of Anne hold its meaning to be this: that, desiring to repeal the act of 1690 altogether, because it had been found unjust and inconvenient, and intending to set up in its stead the old established patrimonial rights of the lay patrons, the legislature in its wisdom left things precisely as they were, while the act repealed was in existence; for that is the argument. I confess my astonishment at it; I confess my utter inability

comprehend what it can mean, or how to their acute minds it ever could have occurred.

What, I ask, does the statute of Anne effect, according to this argument? It reasons in the preamble against the act of 1690, and it leaves the act in force. It professes to repeal the act of 1690, and the whole tenor of the contents of that statute of Anne does repeal that act; and not satisfied with repealing the act of 1690, it sets up patronage by express declaratory words; and yet by a clause at the end it abrogates its own repeal, and sets up the act which it professes to abrogate: that is the argument. It says there shall be no longer any rights enjoyed such as are given by the act of 1690, and then it sets up those rights in full force. It says that the patron's rights shall be restored, and then it destroys that altogether. It says, revive patronage; and the better to revive patronage, it utterly extinguishes it. It says, we are not satisfied with abrogating the rights of the heritors and kirk session and with restoring the right of the patron, but we tell you in affirmative words as well that he has the full right, —that he has not lost that right by the statute we have repealed; and then, to the astonishment of the reader, and of the patron, I should apprehend, who finds himself so dealt with,—to the astonishment of all, it proceeds to tell the patron, you were just where you were before we began our work; for with one hand we set up your right, and with another we pull it down; with the right hand we made the show of giving you back your right, and with the left we take it away for ever. Now, that is the argument upon which this extraordinary construction of the act of 1711 is based.

That your Lordships may see that I am not giving an

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incorrect description of it, I remind you of these wor
" Whereas the presenting of ministers did of ri
" belong to the patrons: and whereas the act of 1
" took it from them and gave it to the heritors
" elders: and whereas this act has proved inconvenie
" and whereas it is necessary that it should be
" pealed; it is hereby repealed, and the right of
" and every patron is restored, settled, and confirm
" provided nevertheless, that such qualified pers
" as shall be presented shall be admitted, as the pers
" or ministers presented before the making of this
" ought to have been admitted."

No doubt this proviso has some meaning; ev word in every statute must have a meaning given to and who can doubt what the meaning is here? the ordinary forms and modes of proceeding shall followed, which are understood to be a presentment the patron to the presbytery moderating in the of the presentee; the presbytery receiving objecti and considering them as to qualifications, and admitt modo solito, the person so by them found qualified, has by the patron been so presented.

That is what the concluding proviso means. Whet it was necessary or not is another question; for thou a legislature is never supposed to use words withou meaning, it is always allowed the privilege of usi words not absolutely necessary. But to say that means that the candidate shall be inducted exactly if this act of 1690 never had been repealed, is to at bute to the legislature not only great infirmity of p pose, but the grossest blundering that can possibly imagined; for it would leave the law precisely wh it stood before the repeal of the act, the abrogation

which is the sole object of the legislature; it would leave in the last section, by way of proviso, that which is repealed in the first section by way of positive enactment. Moreover, to prove that this construction set up for the appellant is wrong, let me observe that unless it has the very effect which I ascribe to it, nothing whatever is gained by it for the argument it is used to aid. The force and effect of those words at the end, "in the same manner," &c, is to revive the former practice under the act of 1690, and undo all the former had done. They have no force or effect at all; they do not help the argument at all; those words either revive or enlarge the act of 1690, or they do not. Therefore I say in the next place, which is decisive of the first question, suppose you make the appellants a present of their argument, suppose you say that this is the force and effect of these final words; suppose you say that the proviso does not revive the act of 1690, which the enactment had first repealed; suppose you say that it brings back things to the state in which they were during the twenty-one years which elapsed from the year 1690, just see how little way you get in your present contention. This is the reason why I have been entreating your Lordships to attend minutely to what that act of 1690 really did; for, as it was a repealed act, it was not worth commenting upon, or worth noticing at all for its own sake; but it was because the consideration of its substance clenches the argument against the construction put upon the statute of 1711 that I began my argument by fixing that in your Lordships minds. The argument is, that the last words of the act of 1711 revived the state of things in respect of presentment and induction, and placed the presentment and induction upon precisely the footing upon which

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they were immediately before the passing of the a[illegible] and ever must be so.

Now what is meant by "before the making of t[illegible] "act?" It cannot, according to this argument, before the year 1690, because every body admits t[illegible] then the old rights of patronage were in force, [illegible] that the former statute expressly orders the presbyt[illegible] to admit every qualified person presented by the patr[illegible] Then the argument I am grappling with must ne[illegible] refer to the state of things during the twenty-one ye[illegible] that elapsed between 1690 and 1711; it must m[illegible] this or nothing; it must mean to set up the presentm[illegible] of the patron to the presbytery, the sustentation by t[illegible] presbytery of that presentment, the dissent of the c[illegible] gregation without reasons against the presentee signi[illegible] to the presbytery, holding themselves bound by t[illegible] dissent, and therefore, and for no other reason, reject[illegible] the patron's presentee. That is the argument. [illegible] is that the state of things during the last twenty-o[illegible] years by the act of 1690? It is as utterly differen[illegible] any one thing can be different from any other, for t[illegible] act of 1690 does not prescribe any presentment by t[illegible] patron to the presbytery; it prescribes a presentme[illegible] by the heritors and kirk session to the congregatio[illegible] The act of 1690 does not prescribe a dissent or [illegible] assent by the congregation without reasons; it pr[illegible] scribes a statement by the congregation of reasons f[illegible] or against the presentee. The act of 1690 does n[illegible] prescribe an absolute binding of the presbytery by t[illegible] assent or dissent of the people; it prescribes a co[illegible] noscing by the presbytery, and an adjudicating by t[illegible] presbytery upon cognoscing, that is to say, up[illegible] examining, those reasons. Consequently two thi[illegible] more completely different than the state of matters

it existed between 1690 and 1711 and that which is now contended for by the presbytery against Mr. Young as the relative position of the parties under the proviso cannot possibly be imagined. My Lords, I hold this to be quite conclusive, I hold this to be demonstrative, that there is no foundation whatever for the construction sought to be put upon the act of 1711. It is equally clear that this argument might be admitted, without benefit to the appellants or damage to the respondents, to its full force. I think it is very absurd, I think it is grossly indecorous towards the legislature, I think it is mocking the legislature to suppose that they did so great an absurdity as to say that they meant to repeal an act, and yet to keep that act in force. But still I will admit, for argument sake, that the construction is both decorous and well grounded, that the act of 1711 left the matter of presentment and induction precisely upon the footing upon which it stood immediately before 1711. The appellants cannot require a larger concession than this. Then what follows? Not the advancement of their argument by one hair's breadth; for what men did before 1711 and after 1690 is not what the appellants have done, is not what they pretend to do, is not what they contend for the right of doing. Therefore it appears to me perfectly evident that this construction of the act of Anne is wholly groundless; that the act of Queen Anne repealed the act of 1690, restored the right of patronage, and left that right of patronage precisely as it stood before the act of 1690; but that if this construction were ever so well grounded, it is wholly beside the present question.

But it is said to be a very strained and fanciful construction to import into the act of Queen Anne those words, "as matters stood before 1690." My Lords,

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I am not importing those words or any others; but meaning of the statute of Anne, so plain that he runs may read, is to abrogate the act of 1690, and th fore to leave things as they stood before 1690. act of Anne says, "let the statute of 1690 be enti "out of the field; let it be abolished altogeth Then it equally says (for this is implied), "let mat "be as they were before that repealed act passe When you repeal an act in one year which was pas twenty-one years before, of necessity and by the al gation you restore things to the state in which t were twenty-one years before. If there comes at end of an act of parliament a clause about which so doubt is sought to be raised, are not you to adopt or other construction of that clause, according as makes out or does not make out,—according as it he or frustrates, the plain and obvious meaning of whole statute itself? That is an ordinary and sim principle of construction, not only of all acts of par ment, but of all instruments, all wills, all deeds, and writings whatever; far from being fanciful, it is plain rule of common sense; far from being strained, is the only natural course.

These, therefore, are the grounds upon which I ha come to the conclusion that the judgment must affirmed. I wish I could have stated them more short If I had had time to digest my judgment, and, as usually do, reduce it into writing, I should have spar your time; but it was a choice of evils; because I mu either give my judgment at greater length and with le compression than I could have wished, or I must del giving it; a thing on all accounts to be avoided possible.

Now, my Lords, although these views satisfy my o

mind, yet, in consideration of the importance of the question, and by way of confirming the view I have taken of the construction of the statute, I think it may be advantageous that we should just look at the subject in different lights, that we see it from various points of view, for the purpose of observing whether this consideration of it in those various lights and seen from different quarters may not aid the decision to which by other means we have arrived. First, it is admitted on all hands that neither the general assembly nor any consistorial court has any vocation to adjudicate on merely civil rights; that is granted on all hands. It is allowed by every reasoner on these subjects that if a question arises, whether it has the patronage of a certain parish or church, this is for the courts civil, and not for the courts spiritual. It is admitted fully, without any hesitation whatever, that the ecclesiastical courts are confined to spiritual matters, and that the temporal courts have exclusive jurisdiction over civil matters. Consequently it is certain that if this were a proceeding, or if the grounds whereupon it is sought to be rested were arguments, that affected the rights of the patron, the claim of the presbytery could not be sustained; nor could the general assembly, which passed the act of 1834, deal with those civil rights. Now, let us see whether they have dealt with those rights; let us see whether that is not the effect of the act of 1834 passed by the general assembly, acted upon by the presbytery, maintained in argument as the title of the appellants; for though I have not mentioned that act of assembly, yet I have argued all along with reference to it in considering the argument of the presbytery; and if I have defeated that argument I have defeated the right of the

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general assembly, subject to an observation as to the question of jurisdiction hereafter to be made. Now it being admitted that the assembly has no jurisdiction to judge of civil rights, I apprehend that we shall have the same admission, that if the church court has no power as a judicature to interfere with the civil rights of patrons in any one case, still less can it have any power as a legislature by one sweeping provision to abrogate all those rights in all cases. But let us see whether the assembly does not interfere directly, and almost avowedly, with the rights of patrons by the act of 1834.

What they say is this: the patron has a right to present; we sustain that right; but the people have a right to dissent, and to reject the presentee. Now what is the people's dissent? It is saying, without reason assigned, that they do not like this man; it is saying that they prefer another; it is saying that they prefer any other; it is saying that they will not have him. What does that mean? Under what general expression would you convey the different meanings which all these particular and detailed forms of expression comprehend? I should think choice, election. Refusal to choose—refusal to elect is at least one half of choice and one half of election; because election consists in selection and in choice affirmatively; it consists negatively in rejection of all others, in refusing to choose all others but its elect. If I select A. I reject B., C., D., &c.; if I reject A. I exercise a negative power of choice; I exercise the right of choosing some other person than A., or of saying to the patron, Z. shall not choose A.: that is quite certain. I may call it over by whatever circumlocution I please; I may

that he is not acceptable to me. A person being acceptable to me is the reason why I choose him; a person not being acceptable to me is the reason why I reject him. But because I say he is not acceptable I do not deny that I exercise choice; I exercise the negative choice of saying either, I prefer another to him, and that is one reason; or, I prefer every other to him, and that is another reason. Does not this interfere with a man's right of choice? It is taking half of it away from him; it is saying, you, the patron, have the right of choice, but upon one condition, namely, that you choose the person that I, the congregation, wish; it is saying, I admit I have no right whatever of choice, the whole choice is vested in you, the patron, but upon this one condition, that you choose the person that I would have chosen if I had been to begin: that is the meaning of it. You shall choose whomever you please: that is the meaning of choice. Whoever you please to choose is the man: that is the meaning of choosing. Well, say the congregation—the presbytery—the general assembly, whoever you choose shall be the man, upon this only trifling condition, that you must choose no other person except the man we choose. Who is the chooser there? I think the second person is the chooser rather than the first. If I were to choose, if I may so speak, between the position of the patron and the position of the congregation, I would much rather be the congregation than the patron as regards the choice of A. or the choice of B., because the patron may choose A., B., C., and go on to the end of time, and the congregation will always reject him, till he happens to hit upon X., the particular person they choose.

Now, this illustrates the nonsense of saying that the

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kirk courts seek not to interfere with the rights of the patron. My Lords, I cannot help casting my eye back to the former times of the Scottish church, and endeavouring to figure to myself the contempt, the scorn, the indignation with which such a man as my most venerable relative who once led that general assembly, one of the greatest men that Scotland ever produced, one of the greatest historians, one of the greatest statesmen, one of the most accomplished orators, which any age of this or any other country has ever seen, — what would Dr. Robertson have said to such pretences so couched and so covered, when he led for so many years the general assembly, when he took that well known part on the question of patronage which was supposed to have settled it for ever; that very part which the presbytery and the general assembly of our day have not taken, and in the face of which they have done all these things. It is not difficult to conceive what reception his manly practical understanding would have given to the doctrine of 1834: "We do not interfere with the right "of patrons; they may choose whom they please; but "we tell both parties, both patrons and people, that "any body is chosen by the former whom the latter "dislikes the choice shall go for nothing." His manly and practical understanding, aye, and the honest nature of his venerable colleague Dr. Erskine, who differed from him toto cœlo upon the question of church patronage, (though their difference never threw any shade across the intercourse of the two friends in private life, how would his honest mind have received the subterfuge upon which the distinction of the present change is sought to be raised—the paltry subterfuge, that the rights of the patron are preserved, but the veto of the

parish let in? Aye, or another light of the church, a man of as honest a nature, as sound and sagacious an understanding, as ever flourished in any sphere, a great leader of the general assembly, though not of Dr. Robertson's party, I mean my venerable friend the late Sir Harry Moncrieff; what would he have said? I doubt whether any man could have dared to use such arguments as have been invented at the present time if he had been living. I doubt whether such subtleties would ever have been vented in his presence; but I know, if they had, how swiftly they would have been blown away out of the general assembly, and out of whatever kirk court, be it presbytery, or synod, or consistory, or council, that had ever suffered them to flutter about within the dark aisles of its sanctuaries for the fraction of a second of time; for if there was ever a man who despised such subtleties and sophistries it was that man; if ever there was a man who knew and practised the true rule of honest morals as well as sound judgment and good policy, it was that man,—I mean the rule of never trying to do indirectly what you dare not do openly and manfully and avowedly, and never to seek to escape from or to shelter yourself from the natural and just consequences of your own proceedings by mysterious generalities, and vague phrases, and shadowy distinctions, which, as they never for a moment do deceive yourself who practise them, never can much longer deceive any one else.

Then, my Lords, it is said (to make it still more absurd) that the congregation have a right to say, we do not choose this man; we prefer any other to him; we like him less than any other man that can be mentioned, and therefore we will not have him: and this

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decision of the congregation is to bind the presbytery. But observe all the while, the congregation themselves are not bound by it; for, a few moments after they have said that they prefer any other man to A., you present B. to them, who is another man than A., and they may refuse him as they did A. You may present twenty people after A., but they are not bound to take any one of them. That is exactly the state of the argument. The patron says, I choose A.; he has a right to say so; the presbytery sustains his right; the general assembly sustains his right; he is not called upon to say why he prefers A., if he chooses A. and A. is a qualified person; the choice is in him to select a qualified person. Oh! but, say they, the people shall be called in; and the people say, we do not choose A., and without giving any reason. Now, I say no two things are so impossible to exist together in the same world as the absolute right to choose, on the part of one person, without a reason, and the absolute right to refuse, on the part of another person, without a reason, unless you mean to say that they have a joint choice, and that has been said for the first time in the history of the Scottish church, and in the history of the Scottish courts and the history of Scottish jurisprudence, ecclesiastical and civil, by the act of the assembly of 1834, and by the presbytery acting upon that act of the assembly in this instance.

But then it is said that they would not exercise this veto, as it is called (or right of dissent, as it is translated by way of making it more fatal to the argument which rests upon it,) capriciously; they would do it conscienciously, and they would not refuse a man without reasons. My Lords, I do not much understand, and do not at all ap-

prove of a confidence sought to be reposed in persons whom you vest with the power of acting without a reason, and do not call to give any reason at all, and yet are to confide in their always acting correctly, always exercising it conscienciously; the patron is also to exercise his choice conscienciously; the law does not assume, it does not protect him in the capricious or wanton exercise of what is a kind of public trust. It is a right of private property, but it is to a certain degree a trust for the benefit of the church; and I am sure that if a patron either in England or Scotland were to present a party to the bishop here, or to the presbytery there, whatever his motive might be, if it were a bad one, he would be slow to avow it. He would not say, I presented this man because he is a pot companion, or because he is the nephew or the brother of a mistress or a complying husband. These are all bad motives; he would not avow them if he acted on them; they might influence him, but he would not say so. Now, will the people avow that they refuse a man because he is too strict in his doctrine, which makes him the better pastor; because he is a man of a high moral sense of duty, and will not overlook scandalous crimes in his parishioners; because he is one who will preach the word faithfully and be instant for righteousness in season, and out of season, as his duty to his master prescribes, and as his master and his apostles have enjoined? No congregation will say, because that is a man likely to preach against notorious enormities practised by us the parishioners, and refuse us access to the sacraments of the church if we are of impure life, because he catechises us and insists upon our attention to our spiritual concerns in the performance of his ministry, we do not like

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him. No congregation will openly avow such motives, but they may be motives which influence them all the while; and the act of the general assembly allows the fullest scope to such motives, because it does not require any reason whatever to be given, and the reason, if it were given, is not required to be cognosced and judged upon by the presbytery; consequently they place things upon a very different footing from the act of 1690. The act of 1690 had some sense, it had some consistency, it made some provision for the right government and right filling of the church; for it said, if any man has any reason to propound against the presentee let him state that reason to the presbytery, and let the presbytery judge of the sufficiency thereof, or of the truth of the facts upon which it is grounded. But not so the act of 1834; it says, whoever is presented shall undergo the ordeal, not of examination by the presbytery, but of gossip among the people; and if the people choose to say they will not have him, though the reasons as the bottom of their refusal may be the very things in all the world which make him the fittest minister for the parish, he shall be rejected simply and finally, and rejected only because the people say, we will not have him. That is the act of 1834, and therein lies its material difference even from the repealed act of 1690, which our ancestors one hundred and twenty years ago thought so urgent, so inconvenient, and so mischievous, that they utterly and absolutely repealed it.

Dolus versatur in generalibus is a maxim of the civil law adopted by all our courts, frequently referred to by the judges, no where more frequently than in the Scotch courts, and one which I have oftentimes heard cited both in the general assembly and in the civil courts.

When a quare impedit was once brought in England, where the right of the patron is precisely the same as in Scotland, for he must present a qualified person, and the bishop is to judge of his qualification for the sacred office, that is to say, his literature, his life, and conversation, and his orthodoxy, which comes within literature; nay, according to the calvinistic creed, may come both within literature and life in Scotland,—I am alluding to Specot's case[1] in 5 Coke's Reports, a leading authority here as to the limits of the bishop's power. When Specot was presented by the patron and refused by the ordinary, it was held not to be sufficient for the bishop to return generally that he was non idoneus; but if he had answered minus sufficiens in literatura, that, it was held, would be sufficient; and as the court have no organs to say whether he is or not, the bishop shall decide it, because literature is matter of clerical qualification and clerical competence. It is remarkable that the judges assign for a reason why the general return non idoneus wanted validity, "quod dolosus versatur in universalibus." If they will not allow the bishop or the presbytery merely to say non idoneus, without specifying in what, much less will they allow it to be said, "We will not have you;" they must say why; and then the judges add, "for if it "were otherwise the patron's rights might be prejudiced." So that holding the patron's rights might be prejudiced by a general answer, they require a specification.

This I throw out in answer to what may seem an objection, though it was not much relied upon at the bar, to the course of my present argument. It may be said, if the presbytery had only said "We refuse him," without saying why, nobody could have touched their

[1] 5 Rep. 57 (b), 58 (a).

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decision. In the first place, my Lords, I do not de[illegible]y that if such had been the return of the presbytery, j[illegible]t as the bishop's return was to the quare impedit [illegible]n Specot's case, it would have made our proceeding [illegible] good deal more difficult. The case of the responde[illegible] would then have rested upon different ground; i[illegible] would not have been the same case, and would not have been tangible by the same arguments by which this case is touched. But I say, in the next place, that a general refusal without assigning any reason would not be legal and valid on the part of the presbytery, any more than the bishop's refusal was valid who in Specot's case merely said "non idoneus." He must point out some non idoneitas, of the relevancy of which we, and not he, are entitled to judge; some qualification or want of qualification of which he has exclusive cognizance. But I am not called upon to dispose of that point, because it is not before us. The presbytery have not sheltered themselves under a general refusal; they have come so far to particulars that they have said, we refuse him though a regularly presented person—though a perfectly qualified person; and we reject him because the majority of heads of families in the parish dissent without giving any reason, and we are bound by their dissent. That is their return, and that is a totally different case from the one now put. I understand the act of the general assembly to specify a majority of male heads of families; is it not so, Mr. Attorney?

Mr. Attorney General.—Yes, my Lord, these are the terms.

LORD BROUGHAM.—I think the Lord President refers to that in his plain, distinct, and highly judicial view of the case. "The male heads of families;"—what is the meaning of that? The men are to decide, i[illegible]

seems. Shall nothing be said of women in the matter of salvation and in the administration of the church to which they belong? We are living under the christian and not under the mahomedan law. But it is "the "male heads of families." Now, suppose there are three or four single women—pious women—in communion with the church, and three or four widows, these may even constitute a majority of the whole communicants; are they to have no interference,—never to be consulted at all? Oh! no; the general assembly says they must take whatever the males of the parish choose to impose upon them for their edification. But "heads "of families." Why not lodgers? Why not a respectable and well-informed journeyman? Why not a respectable scholar, more learned than all the parish together? Is he to have no voice quoad sacra, though perhaps a communicant more regular at the altar than any one? No; "the male heads of families," says the general assembly,—"heads of families." Now all this exclusion of females and of lodgers may be right or it may be wrong, but it is not self-evident why; it is not of necessity right, it does not follow from the nature of church discipline; it does not follow as a necessary consequence from the nature of the case at all; it is an arbitrary, it is a gratuitous, it may be a capricious selection of a judicature by the general assembly. And that leads me to my next observation.

If the general assembly have a power to impose the will of this kind of majority upon the whole parish, have they not equally the power to make a totally different arrangement altogether? Can any one earthly reason be propounded which justifies the present criterion adopted by the assembly, the majority of heads of fami-

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lies in communion with the church, which would not just as well, and for the exactly same reasons, and precisely on the same grounds, have justified a totally different scheme of induction altogether. Suppose it had been enacted thus:—provided that he shall be acceptable to the majority of the synod?—that is a very important body; or, provided he shall be acceptable to and chosen by, or not rejected by, a commissioner whom the assembly shall appoint for that purpose to superintend, as they have done in former times; because I read to your Lordships out of the Book of Discipline, and I read to you out of an act, that at one time the superintendence and control was given to commissioners appointed by the kirk to regulate the presentment and induction of ministers. They might have done that; or I will tell you what they might have done, and for aught I know it is the next thing they will do, if you allow them to do what is now attempted. They might have said, provided he be agreeable to the presbytery of the bounds; who could object to that? Is it impossible they should do that? My Lords, it is so far from being impossible that they have done it already. There was an act in 1576 made by the general assembly, by which it was provided that none seek preferment without the advice of the presbytery: that was for a season the law of the kirk, and the assembly may now revive it. The legislature may make that law now which out of the kirk courts was the law before; but has the general assembly any right to do so? Has the church judicature and the general assembly, which by the common law of the land and by statutory enactment is limited to ecclesiastical concerns, a right to do that? for the statutory enactment of the year 1592 is revived in all particulars by the act

1690, c. 5., except as to patronage, and that is disposed of by the subsequent act of 1690, c. 23., which is repealed by the 10th of Queen Anne; but the other is not repealed; the act of 1592 is to all intents and purposes revived, and among other intents and purposes to that of defining, chalking out, and limiting the bounds and the formations of the ecclesiastical jurisdiction. By all these rules, by the common law, by the parliamentary constitution of the country, by statute enactment, by the act of 1592, by the act of 1711, it is the province of the general assembly and the inferior church courts to take cognizance of church matters and to make regulations touching ecclesiastical concerns, and ecclesiastical concerns alone; and they are excluded, they are barred and shut out, from any cognizance of civil patrimonial rights, and not only of civil patrimonial rights directly, but of those things which indirectly affect civil patrimonial rights. They cannot do per nefas what they cannot do per fas; they cannot do indirectly what they cannot directly; they have a right to make rules as to qualification, and they have a right to make rules as to who shall judge and how they shall judge upon qualification, because qualification is admitted upon all hands to be a matter of ecclesiastical cognizance. But they have no right to make a rule as to who shall be chosen and how he shall be chosen when the patron presents him; they have no right to transfer from the patron either the whole or the half, and in this case they have transferred by far the larger half of the choice and selection of the presentee. But one thing is perfectly clear, that no grounds in reason which the general assembly can advance for its right to make the act of 1834 giving a veto to the congregation can be conceived

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to exist which would not give them precisely as com plete a power and as undeniable a right to give a ve to the presbytery of the bounds, that is to say, to repe the act of Anne, and to revive the act, long since re pealed, of 1576, which alone and for the first tim assumed the choice of the presbytery.

It is now fit that I should advert to one topic whic certainly at first did seem to impose some difficulty upo those who maintained the judgment of the Court belo There is a great difference, it was said, between the loca tion or admission of a minister in Scotland and th admission of a clerk by the ordinary in England, ina much as in England the person having the advowso presents his clerk, a person already ordained, to th bishop; whereas in Scotland the presentee is ordaine and inducted unico contextu by the presbytery, th presbytery being beyond all doubt the only judge o ordination, with which the municipal court has no rig whatever to interfere. Ordination, it was said, is thu mixed up with the induction, and cannot be severe from it. But in the first place we must look to th case before us; the severance here at least is complet The presbytery do not refuse to ordain; nothing of th kind; they do not say he is not qualified; there is n objection whatever to ordaining him; but they sa though we have no objection to ordain him we do no choose to induct him into the parish of Auchterarde because the people dissent from receiving him; and th is our only reason. I think that is a sufficient answer to this objection, and I believe I threw it out in the cour of the argument.

But there is another answer:—If a person being probationer is brought before the presbytery for indu

tion into a benefice, he is then ordained as well as inducted, that being the first benefice to which he is appointed. But whatever argument and whatever law applies to the case of the first benefice in respect of the present controversy, must be equally applicable to the second benefice, that is, to the case of transportation, as it is called, from one benefice to another. Now, in this case of transportation to a second benefice the argument is sifted entirely from the difficulty with which it is sought to be mixed up as to the first benefice, because the first benefice is accompanied with ordination, and the second benefice is accompanied with no ordination at all. The presentee is already e clero Domini—already ordained, and therefore the only question, in the second instance, that can arise is with respect to inducting him into the parish of A., whereas formerly he was settled in the parish of B. Consequently in this instance the presbytery can never say, we refuse to ordain him (which is matter of ecclesiastical, not of civil, cognizance) because he has already been ordained; and the only question is, shall he be inducted into the parish of B., having been already settled in the parish of A.; and that question is only of civil cognizance. No man is absurd enough to contend that the congregation should be consulted only in cases of transportation, and not of original settlement; nothing so wild has ever been urged as the proposition that the assembly has the power to make this act as to second settlements, though not as to first inductions. The two cases stand upon the self-same grounds, and the same arguments apply to both. I think those two answers,—either of them, but citing both together, are sufficient to repel the objection which I have now been considering.

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Another argument was used, which I cannot alt gether pass over, as many of the learned judges go ve mainly upon it. It was said, is a call of no avail? do it mean nothing? Have all the people of Scotland, all the lawyers and all the divines of the church court been hallucinating for so many years, when they ha held a call to be necessary as part of the induction, a that the moderating in a call is the proper function the presbytery? I by no means say that a call nothing; but I only say it is not every thing; I de that it is decisive; I refuse it the virtue which othe ascribe to it. In the first place, it is admitted on a hands that nothing can well be conceived more obscu and involved in more doubt than the whole history calls in Scotland. At one time there was a call mo effectually, namely, during the interval between 168 and the year 1711, because during that period the ki session and the heritors presented to the congregatio and if the congregation did not call the presentee r further step could take place; only it is to be observe that was a call of a very peculiar nature, and whol different from the one now contended for. The pow to refuse or give a call was of a very limited kind, f the people could not refuse giving the call unless th assigned reasons, and the presbytery were to judge those reasons. But was there ever any period in t history of Scotland in which it was held, either pra tically or by law, that the congregation was by a major of voices to call a person, and that if they did not such majority call him, nothing could be done in favour? I know very well that there are two auth rities in favour of it. The first Book of Discipline 1560, and the second Book of Discipline in 1578; f

the first says the people have the power of electing: it says in so many words, "it pertaineth to people to elect "their pastors;" and the second says that that "has "always been the practice of the kirk till antichrist "intruded into it." But that is not the law now; it was not the fact at any time; I have shown your Lordships that it is a very gross mis-statement of the historical fact; and that it never was the law of the church is clearly admitted by the very fact of the general assembly having had to invent this new mode of proceeding, namely, to call upon the majority of the male heads of families in communion with the church to accept or reject him. The majority being substituted for the former practice of any two or three persons is most material, and shows a complete change from a mere formality to a substantial choice.

But whatever was at any one time the force or validity of the call, the statute of Anne does away with it altogether, unless in a modified way and to the very limited extent, that of somewhat more and not much more than a mere ceremony, to which extent only it has been limited ever since that time. The best proof of this is, first of all, this act of 1834, making, for the first time, a majority necessary, and pointing out of whom that majority shall consist; and in the second place, the avowed fact on all hands that the call might have been made by any two or three people in a parish of two thousand, and that if the presbytery chose to moderate in that call, it was just as valid a proceeding as if it had been made by the majority or by the whole parish. Now, does not that give one a very great misgiving as to the substantial meaning of the call,—as to whether it really means anything or nothing? It can be got rid of by almost any form.

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I suppose that the mere presentment may be a c there is no law which points out who shall give the Why may not the patron, in respect of his advowson held to belong to the parish, even if he be not a her or an inhabitant? Why may not the patron's con tion with the parish in respect of that advowson be l to be sufficient for the purpose of giving a call? know there is no authority against me; I know ther no answer to these questions by any dicta of judges any authority of text writers.

But what authority is there in favour of a call? doubt there is the act of assembly of 1782, to wh reference is made by Lord Moncreiff; and there is decision of that venerable body in 1790, highly dis proving of the settlement of a presentee who had call. For aught I know it may be a great informali but observe, they did not rescind the settlement on t account. But if he had got in without a presentati or if he had got in without the presbytery inducting h or if he had never been ordained, would they h allowed him to continue? No such thing; they wo have ousted him from the church, and they would h had another man appointed, according to the laws a formalities of the church. When it is said that the c is a very substantial ceremony, and that it is proved exist in right and in law, and to be necessary, by t Stirlingshire case in 1790, I think you only prove t reverse by the quotation of that case, inasmuch as was one where there had been no call of a presentee any manner of way, where the presentee never had call from any single person in the parish, and there w no moderation in the call by the presbytery; neverth less he was held to be validly inducted, and to have

good right to a settlement, even by those who were censuring the illegality, saying all the while fieri non debuit; factum valet. In other words a form had been omitted which ought to have been observed, but the omission was immaterial. Thus a call is shown to be as immaterial a part of a valid settlement, as it is immaterial to a valid marriage by banns, that the parties shall have resided in the parish before proclamation. That is a directory, not an imperative part, under Lord Hardwicke's marriage act. It is a very material direction; it goes to the main purpose of the statute; here it is not a necessary condition precedent; the marriage is valid without it.

My Lords, this throws great light on the subject, and mainly strengthens instead of negativing my argument, for it shows that a call is held by the church court itself to be rather a matter of convenience and a useful form,—if you will an important form, than of the very essence or substance. What then is the call? It is a remnant of the old, obsolete, and repealed right of election. Whether it comes from the period which elapsed from the Revolution to the 10th of Anne, while the act of 1690 was in force, or whether it comes from some mistake of the authority of the two Books of Discipline in the 16th century I need not stop to inquire. The nature of the thing clearly enough appears from the way it has been dealt with. This serves to demonstrate that it has not been held a condition precedent of a valid induction, but that the induction may be valid without that condition being fulfilled; nothing can more clearly indicate its being a mere ceremony or form. I suppose it is convenient and useful that there should be a presentation in form of the person to the congregation as well as to the presbytery. The pres-

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bytery are to judge of his qualifications without appeal, except to the church court, but the congregation is to be brought acquainted with their future pastor; and as the presbytery are to judge of his life and conversation, as well as his literature, it is convenient and useful that the people should have an opportunity of coming forward with any objections which they may have to him in these important particulars. But that is wholly different from the right of veto or dissent or refusal without any cause shown.

Now I will take an analogous instance: Mr. Attorney General very properly alluded to the coronation. It is a decent and convenient solemnity to present the sovereign to the people, and the people are supposed to take part in the choice; a part, however, so immaterial that if they were all with one voice to reject, the coronation would be just as good, would go on exactly in the same way, and the rejection or recalcitration of the assembled people would have no more weight than the recalcitration of the champion's horse in Westminster Hall during the festival attending the great solemnity. It is an obsolete right, which has not within the time known history ever been exercised by any people.

But I will state another instance which is very analogous, the publication of banns. Now both in Scotland and in England a regular marriage requires the publication of banns; in Scotland marriage may take place by mere words of consent without any church ceremony whatever, and it is supposed that in England the law was so before the marriage act. But a regular marriage can only be made by publication of banns, and whoever in Scotland does without is liable to church censure. Now, when the banns are published in England, the object is to ascer-

tain by this publicity that there is no lawful impediment, such as consanguinity within the limited degrees, or prior marriage, or refusal of consent by parents or guardians. I have taken pains to inquire, both from bishops and priests, what would be the consequence in their practice if upon publication a person were to interpose and forbid the banns, or afterwards to forbid the marriage, which may be done at the altar when the marriage is about to be solemnized. The answer they have all given is, I should suspend the solemnity till I made inquiry. But suppose the person forbidding should say, I give no reason, but I only forbid the banns; or suppose he gave another reason, that he was the rival of the husband, or that she was a rival of the lady; a very good reason for the party not wishing the marriage to take place, but no legal objection to the marriage. The answer is, that he would not be attended to at all. The marriage would go on just as well as if the dead silence prevailed through the church which generally attends those interesting solemnities. Thus, then, it is a very convenient thing that banns should be published, because it gives publicity to the intended contract; it gives parties an opportunity of coming forward. If there has been a prior marriage, it gives the public an opportunity of saying, Do not commit bigamy. If there is consanguinity, it gives the party an opportunity of saying, Do not allow incest. If there is an infant about to be married, it gives the parent or guardian an opportunity of saying that his consent has not been given; but though the law requires that the parent's or guardian's consent shall be necessary where the marriage is by licence, there is no such accompanying necessity where it is by banns; and it is

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a very great inconsistency in the law, for, though th legislature meant, no doubt, to prevent marriage witho consent, yet if the banns are published, and the prie chooses to marry in spite of the parents and the gua dians, their refusal or opposition signifies nothing, an the marriage is just as valid as if they had consente Then I am for the publication of banns. It would n be a regular marriage without it. It would not be valid marriage in England without it, unless by licenc which is accepted by law. It would not in Scotlan be a marriage free from the church censure without i and therefore I am for it, and therefore we are all f it, and therefore we think it is a useful and a convenie part of the ceremony, because it gives opportunities objections being made by giving publicity to the tended contract. But then the consent or silence is a necessary part of the marriage; nay, the banns call persons to object, and if they do object the marri proceeds just as if they had held their peace. Furth more the last publication tells all the world that if th do not then object they must for ever after hold th peace, and yet a person present, and saying not a wo may come forward the day after and set aside the ma riage by proving a lawful impediment. Precisely so is with respect to the call. I have attended to its hi tory as well as I could, but I cannot find,—and I s that some of the learned judges who have given gre attention to the subject have come to the same co clusion,—I cannot find that either before or after th statute of Anne, unless between 1690 and 1711, the ce has been held to be a necessary part of the induction, a a condition precedent to a valid settlement. At a events I am perfectly certain that if such force an

effect is given to the call as to make it an essential part of the proceeding, and much more, if the general assembly, acting upon this supposition, can carry into effect any assumed intention of the law so as to make a specific provision against an induction ever taking place without the consent of the majority of the male heads of families, then the statute of Anne is abrogated, and the rights of patrons are utterly extinguished.

It only now remains that I should say something respecting the question of jurisdiction; but I have no doubt whatever upon that. It is asked, "How can the "Court of Session interfere in a matter of ecclesiastical "cognizance?" Prove to me your position, that this is a matter of ecclesiastical cognizance, by which I mean of exclusive consistorial cognizance; prove to me that this is a question of qualification like the question of sufficiens or minus sufficiens in literatura, and then I say that the Court of Session will be excluded, just as the Court of King's Bench was in Specot's case upon a quare impedit, but which Court did not deem itself to be excluded (and the Common Bench agreed with them) where the return to the quare impedit by the bishop was non idoneus. They would not have been excluded even if the bishop had said schismaticus inveteratus, much less if he had said merely nolo inducere, as the presbytery has here done; but we have here no such question as one of qualification. We have a question of election and nothing else, a veto or dissent set up by the ecclesiastical court; and which, if they had done so in England, would have been ground of prohibition, as an interference with the jurisdiction of the municipal courts in matters temporal; and therefore this argument fails altogether.

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But it is said, the Court of Session may give the civil rights,—the right of stipend, and can do nothing more yet, it is admitted all the while that the court has no power to give those civil rights, to bestow the temporalities of the church on the pastor, unless he is inducted, so that the non induction was as complete a bar to the civil court giving him the temporalities as if the civil court had been told, you shall not adjudicate upon the matter at all.

Then it is said, you have no means of carrying into effect the decree of the Court of Session, albeit supported by the authority of the House of Lords, which is a decision of parliament in its judicial character, upon the subject. In other words, although you say the presbytery have acted wrong, although you say that their reason for rejecting is of no avail whatever, although you say that the law is contrary to what we have supposed it to be, and although you say, deciding upon the petitory part as well as the declaratory part of the summons (which, however, you are not called upon to do), let the presbytery induct immediately, for it has no grounds for refusing, still it is affirmed that the presbytery may persist in refusing and must prevail.

My Lords, it is indecent to suppose any such case. You might as well suppose that Doctors Commons would refuse to attend to a prohibition from the Court of King's Bench; you might as well suppose that the Court of Session when you remit a cause with orders to alter the judgment would refuse to alter it. Conflict of laws and of courts is by no means unknown here. We have, unfortunately, upon the question of marriage had a conflict dividing the courts of the two countries for upwards of twenty-five years, in which the Court of

Session have held one law, and in which your Lordships and all our English judges have unanimously held another law. The Court of Session in Scotland has held and still hold two persons to be married whom your Lordships hold not to be married. But has the Court of Session ever yet, when a case, which had been adjudicated by them according to their view of the law, has come up to you, and you reversed according to your opposite view of the law,—has the Court of Session ever then continued the conflict, which would then have become not a conflict of law, but a conflict of persons, a conflict of courts, a conflict in which the weaker would assuredly have gone to the wall? The Court of Session never for one instant thought of refusing to obey your orders upon this matter, whereupon they entertained an opinion conflicting with your own. For this reason alone, and it is enough, I have no doubt whatever, that the presbytery, when your judgment is given declaring their law to be wrong, declaring the patron's right to have been valid, will even upon the declaratory part of the judgment do that which is right.

And then may come this question: what is the Court of Session to do upon the petitory part of the summons, supposing that shall be insisted upon? Enough for me to-day to observe that this is not now before us; but suppose it were I should have no fear whatever in dealing with it. I should at once make an order upon the presbytery to admit A. if duly qualified, and to disregard the dissent of the congregation. And, my Lords, why do I say so, and with such confidence? Because I look to the cases; and as these are all to the same effect, there is only one with which I shall trouble your Lordships. None of them bear upon the main question now before

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us, but they effectually raise the inquiry, collater instituted, How are the court's orders to be enforce They are all cases of conflicting rights of advowson, t are all cases where there was no question whate between the presbytery and the courts, and the o question was as to the right of A. to be present They are all cases, therefore, which fall without scope of the main argument here before us, and thr no light upon that. But upon this collateral questi they do throw light; and I refer to the case which most learned judge, Lord Gillies, has justly called a well known case, for it was attended with unpleas circumstances, — the case of Lord Dundas v. Zetland Presbytery, in the year 1795. Now, what the conclusion of the libel there?—"That it should "found and declared that the pursuer had a right "the patronage, that he exercised his right as patr "within the time prescribed by law, and that the p "sentation to Mr. Nicolson is valid and effectual, a "was offered to the moderator of the presbytery in d "time." The conflict was this, that the presbyt had chosen one, and they ought to have chosen other. The Court were called upon to declare "t "the presbytery should be decerned and ordained "decree foresaid to give due obedience to the s "presentation, and to proceed in the settlement of "said Nicolson," who was the conflicting, or, as t call him, the competing, presentee, "until the fi "end and conclusion; or, until the said Nicolson sh "be settled in the said church and parish of Unst; "ought and should be found and declared by dec "foresaid that the pursuer and the other heritors, "renters, and others liable in stipend to the mini

"serving the cure of the said parish, are entitled to "withhold and retain the said stipend," and so forth. They then settled Nicolson, whose name, Lord Gillies says, appears as the minister next year instead of Gray, the competing one, whom they had before erroneously admitted and settled.

Now observe that the cause of this dispute was totally different from the present; it was because Nicolson was the proper man in competition with Gray; but that is perfectly immaterial to the present argument, touching the jurisdiction of the Court of Session. Whatever was the cause of dispute, the presbytery had acted wrong. The presbytery had refused to admit Nicolson; they had admitted Gray. What does the Court of Session say? Admit our man Nicolson, and oust your man Gray. Why was it not said in that case, as has been said here, this is nonsense, this is incompetent; you have mistaken your way; the Court of Session has no power; because, when the Court of Session declares that Nicolson has the right, the presbytery will continue to keep in Gray, and then what can you do? And so would arise in that case of Zetland every one of the arguments with which an attempt has been made to scare your Lordships from putting a proper construction upon the act of parliament, and from doing your duty in this appeal; namely, can you have letters of horning against a whole presbytery? Can you proceed against a whole body of clergymen? Can you bring an action of damages against a whole body of men? That is the argument with which we have been harassed and threatened at the bar if we here affirm the judgment of the court below. Why was not that argument used in the case I have just mentioned to

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scare the court below? It is good for nothing; but it would have been not more worthless there than it is here. And if the Court of Session had the power of saying there "Take Nicolson and oust Gray," have we not just the same power here of telling the presbytery "You have mistaken the law" (a perfectly innocent mistake, to which all men are liable); retrace your steps, and take the person presented by the patron, if he is qualified according to the ecclesiastical rules? Therefore, I hold that this argument on the jurisdiction is utterly absurd and untenable, and proves no impediment in our course towards a right conclusion.

These are the grounds upon which I hold that it is expedient and just, and therefore necessary, for your Lordships to affirm the judgment of the Court below. I find that I have gone at much greater length in point of time into this case than was at all desirable; but when I consider the great interest which it has excited, and, moreover, when I observe that I look upon it as much more clear than many have considered it, which have dealt with it below, I do not regret that I have pursued this course.

My Lords, no person would lament more deeply than myself if the judgment which I am now about to move should give offence to that most venerable body, the general assembly, as representing the church of Scotland. I have the most profound veneration for that establishment, and it is hereditary in me as well as personal. I am myself sprung from some of the most venerable and most learned members of that establishment; sprung directly from them, as well as knit to them by collateral connexion. I cannot be indifferent to its welfare or deaf to its claims, or in the slightest degree prepared

treat it with any other than the most affectionate reverence.

My Lords, I am not the only person engaged in this discussion before your Lordships house who is connected with the church of Scotland, and who is imbued, I know, with those joint feelings towards it. The learned Attorney General is himself descended from a most venerable pastor of that establishment; and I know, because nothing could more clearly indicate it than the whole course of his argument, and all the observations which fell from him, that he is most scrupulously and delicately averse to any thing which could betoken the slightest want of respect for it, as much so as I am myself. I say this the rather because I have been not a little astonished, in my correspondence with Scotland, to find that something which fell from him had been so grossly misrepresented or misunderstood as to make it fit that I should authoritatively, and as a witness present during the whole argument, contradict it, as utterly unfounded in point of fact. Nothing could be more perfectly respectful and affectionate towards that body than the whole of the argument on the Attorney General's part throughout.

My Lords, I join with him in the deepest sorrow, that anything in this House should pass, to which he has contributed by his argument, and to which I am contributing more effectually by my judgment, with the tendency of perpetuating the discord now prevailing in Scotland. That it should ever have begun all must sincerely deplore, but that it should continue is a matter of still greater affliction to every friend of his country. I have declared my inviolable respect for the kirk and general assembly, but any want of respect that I could

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show towards them, any irreverence—any mockery o them, any slander that I could bring against them, an attempt to revile them, or to hold them up to hatre and to scorn, would be a mere jest compared to th attempts that are made by some who take an opposit view of the case, and who, without meaning, God know any more than I do, any the least disrespect, think the are taking the best means for establishing their privileg by holding out indications that the assembly will pursu its own course; that the assembly will disregard th authority of the law; that an assembly of christia ministers will be parties to the fomenting of discord that the last thing the ministers of peace are minded promote is the peace of the church of Christ committ to their care; and that the only thing they now thi of is the victory of them, the churchmen, the pastors Christ's flock, over the judges, over the supreme judg of the land, and over the law of the land itself victory to be won by setting up acts of their ow which they have no title to pass, against queen, lor and commons,—the statute law of the realm.

My Lords, I defend the assembly against the ar ments and the threats of their advocates. I protest the part of the assembly as a body of christian men whom the bulk are christian ministers, against imputation thus thrown out against them by this cou of defending them, and I say that my hopes of the my confident expectations of what will be their cond are wholly the reverse of those prospects thus held o that it was an injudicious line of argument on th behalf, an argument which I am morally certain wo be repudiated and spurned by the assembly itself. Lords, that assembly will do its duty, will show

veneration for the established authority of the law, will rest satisfied with having entered its protest and indicated upon its records its own opinions; but will, with its inferior judicature the presbytery, render a willing and respectful obedience to the law of the land as pronounced by the Court of Session and as affirmed by your Lordships. With these views, my Lords, and upon these grounds I am humbly to move your Lordships, that the interlocutor appealed from be affirmed.

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LORD CHANCELLOR.—My Lords, it is impossible for me to conclude to-day the observations which I think it my duty to present to your Lordships in this case, and therefore, with your Lordships concurrence, I shall adjourn the further consideration of this case till half past two to-morrow.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. I know that my noble and learned friend means to enter into this case at large, and therefore I entirely agree with him that it will be most satisfactory to postpone it until to-morrow.

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LORD CHANCELLOR.—My Lords, it was stated to your Lordships yesterday by my noble and learned friend, that the opinion we had formed upon this case had been arrived at by us without any communication with each other. My Lords, that statement required no confirmation from me; I only refer to it for the purpose of explaining the grounds upon which I propose to follow a course in this case which I should be induced

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to abstain from in any other. When I asked my nobl
and learned friend within a few days what opinion h
had formed upon this case, I certainly was not withou
a very confident expectation of the answer I shoul
receive, not from any thing which had passed betwee
us, but because in examining the case myself it appear
to me difficult, if not impossible, to suppose that m
noble and learned friend could have come to an
conclusion other than that at which I had arrive
myself.

My Lords, in this case, as in all others of importanc
I have thought it the better course to reduce to writin
the opinion I have formed, and the reasons upon whic
it was founded; a course which I am well aware that m
noble and learned friend approves, inasmuch as I belie
no judge before his time delivered so many writte
judgments; a course which is productive of the greate
benefit, which the profession have particularly e
perienced from the judgments of my noble and learne
friend; and a practice which I am happy to say h
been pretty generally adopted in all the courts of We
minster Hall. My Lords, following this course, I hav
after considering all the documents upon the subje
and all the authorities referred to, committed to writi
the opinion I have formed, with the reasons upon whi
it is founded. My Lords, that was accomplished lo
before I had any communication with my noble a
learned friend upon the subject.

Now, in listening to what fell from my noble a
learned friend yesterday, I found that very many of t
grounds upon which the opinion which I have form
would rest have been anticipated by what was sta
yesterday. Under ordinary circumstances I should ha

thought that a very sufficient reason for abstaining from a repetition of that which had been so much more ably expressed by my noble and learned friend. But in this case I consider it to be rather a ground for exactly the opposite course of proceeding, because it cannot but be satisfactory to those who take an interest in this matter, and who of course will anxiously consider all that falls from your Lordships upon this question, to see what have been the workings of the minds which have been applied to it without any communication with each other; and if there should be found to be a similarity of reasoning and a community of view of particular parts of this case operating upon the mind of my noble and learned friend and of myself, no doubt it will have some effect in leading those who may consider the judgment of your Lordships, to be satisfied at least, that there probably is some foundation for those conclusions to which we have both arrived separately, and apart from each other.

It has seldom happened that your Lordships have been called upon to adjudicate upon a case of more importance than that now under your consideration. It affects the manner in which ministers are to be appointed to a very large proportion of all the parochial benefices in Scotland, and believing, as I do, that the interests and well being of the people now and hereafter depend much upon the due execution of the most important duties of parish priests, I feel deeply the responsibility which attaches to all those who are called upon to decide upon the manner of their appointment; for although no opinion as to policy ought to influence our judgment, which ought to be founded upon grounds of law only, yet the importance of the judgment to be

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pronounced, and the evil consequences of any error, impose upon us all the sacred duties of exercising every means within our reach of coming to a safe and satisfactory conclusion.

With these feelings I have addressed myself to the consideration of this case. It naturally divides itself into two questions.

First, whether the proceeding of the presbytery of Auchterarder, founded upon the act of the general assembly of the 31st of May 1834, was legal, or an invasion of the rights of the pursuer. And, secondly, whether the interlocutor of the Court of Session appealed from was within its jurisdiction, and such as, under the circumstances of the case, ought to have been pronounced.

In considering the first of these questions, much of the difficulty which has been felt would, I think, be removed if any precise meaning could be affixed to certain terms which have been necessarily introduced into the argument on either side. Both parties agree that the right of presenting the minister belongs to the lay patron, and that the right of judging and of deciding upon his qualification for his office belongs to the church; for such indeed is the substance of the legislative enactments upon the subject. Both these rights must be exercised in the settlement of the minister, but the boundary between these rights,—what belongs to the one and what to the other, is the real question in dispute.

The pursuers allege that the right of presentation entitles the presentee to be admitted into the benefice, unless the church shall, upon examination and trial of the presenteee, find him not qualified.

The defenders, on the other side, contend, that to the church belongs the right of deciding upon the whole matter of admission, including every consideration which may affect the propriety or impropriety of the presentees becoming ministers of the parish.

What is the extent of the patron's right to present, and what the jurisdiction of the church in judging the qualifications of the presentee? That is the real question: if the acts, upon the true construction of which the whole contest ought to rest, reserve the right to the one and the jurisdiction to the other? Which being so, it necessarily follows that that only can be a true construction of the acts and a proper definition of those terms which preserves this right and this jurisdiction. The boundary between the two must be so fixed that the one must not be permitted to encroach upon, still less to destroy, the other.

If it were safe to refer to the law and practice of England in ascertaining the meaning of those terms, whatever doubt may exist would be speedily solved. It is the undoubted right of the patron here to present, and to insist upon the admission to the benefice of any qualified person, and the jurisdiction of the bishop is confined to deciding upon the qualification, or rather disqualification, of the presentee. But I have felt desirous of avoiding as far as possible any reference to the law and practice of this country, and choose to discuss and decide upon the law and practice and authorities of Scotland alone, even as to the meaning of the terms used; and I think there is not only in the statutes themselves, but in authorities of an earlier date, conclusive proof of the sense in which these terms were understood from the earliest periods, and of the meaning

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which ought to be attributed to them in putting a construction upon the statutes.

That the right of patronage, as it existed before the reformation, though no doubt subject to the jurisdiction of the church as to the qualification of the presentee, was not subject to any limit or restriction from the people or congregation, has not been disputed.

In 1565 the general assembly, in a message to the queen, expressed their opinion as to the meaning of those terms—patronage of the patron, and trial and examination by the church. They say, "Our mind is not that Her Majesty or any other patron should be deprived of their just patronages, but we mean whatsoever Her Majesty or any other patron do present any person to a benefice, that the person presented should be tried and examined by the judgment of learned men of the church, such as are the presentment superintendents; and as the presentation unto the benefice appertains unto the patron, so the collation by law and reason belongs unto the church, and the church should not be defrauded from the collation, more than the patrons of their presentation; for otherwise, if it be lawful to the patrons to present whom they please without trial or examination, what can abide in the church of God but mere ignorance!"

Balfour[1], who writes in 1566, says, "Ane laique patron of ony kirk or benefice vaikand sould present thairto ane qualifyit and habil persoun of sufficient literature, honest in life, and of gude maneris." At this time, then, all the church asked as against the patron was a right to judge of the qualification of the presentee; that is, of his literature, good life, and manners.

[1] Page 501.

When, therefore, the act of 1567, c.7., ordained that the examination and admission of ministers should be in the power of the kirk then publicly professed within the realm, the presentation of lay patrons always reserved to the just and ancient patrons, and directed that the patron should present one qualified person within six months, otherwise that the kirk should have power to dispone the same to one qualified person for the time, it is clear that the presentation so secured to the lay patron was to be subject only to the trial and examination of the church as to the qualification of the presentee, that is, as to his literature, life, and manners; and that the appeal given by that act to the patron against the refusal of the superintendent to receive and admit the presentee applied only to what had been before the subject of trial and examination, that is, his qualification as to literature, life, and manners.

If such was the extent of the right of patronage, and such the limit of the jurisdiction of the church in the trial and examination of the presentee under the statute of 1567, cap. 7., there will not be much difficulty in tracing those rights and duties through the subsequent statutes.

By the statute 1592, cap. 116., it is ordained "that "all presentation to benefices be directed to the par- "ticular presbyteries, with full power to give collation "thereupon, and to put order to all matters and causes "ecclesiastical within their bounds according to the "discipline of the kirk; provided the foresaid pres- "byteries be bound and astricted to receive and "admit quhat-sumever qualified minister presented be "His Majesty or laick patrones."

By another statute of the same year 1592, cap. 117., it is ordained, that upon deprivation of a minister the

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patron shall present another qualified to the kirk with six months, and that if he fail so to do, the right presentation shall devolve to the presbytery, to the effe that they may dispose of the same, and give collation such qualified person as they shall think expedie Provided that in case the presbytery refuse to adm any qualified minister presented to them by t patron, it shall be lawful for the patron to ret the whole fruits of the benefice in his own hands.

There is no allusion in any of these statutes to a authority intervening in the settlement of a minis between the presentation by the patron and the adm sion by the presbytery of a qualified person, whi qualifications were clearly personal; and of which, indee the church was to judge, but was bound and astrict to receive and admit any person presented who shou be qualified.

There is no allusion in any of these statutes to ar election by the parishioners, or to any reference to the for approval or disapproval. The early reformers ha struggled for some such power, and in the first Book Discipline, composed in 1560, and therefore before th act of 1567, and the second Book of Discipline, compos in 1578, and therefore before the two last acts, it expressly claimed; but the legislature decides again it, and secures to the patron the right of presenting th minister, and to the church the power of rejecting hi but only upon the ground of his not being qualifie Such were the terms and conditions upon which t presbyterian church government was established, a received the sanction of the legislature; but it appea that these terms and conditions were unwillingly su mitted to, for, so early after these acts as the year 159

the assembly enacted and attempted to establish that none should seek presentation to benefices without advice of the presbytery, and that if any should do the contrary they should be repelled; and this was approved and re-enacted by the assembly in 1638.

When, therefore, the legislature, notwithstanding this feeling and these attempts on the part of the church, declared that the presbyteries were bound and astricted to receive and admit whatsoever qualified person was presented by the lay patrons, there can be no doubt of the object of the enactment, or of the construction to be put upon the terms used.

The act 1690, cap. 23., which for a time destroyed patronage, recognizes the efficacy with which it had been exercised, and recites that the power of presenting ministers to vacant churches of late exercised by patrons had been greatly abused, and annuls and makes void the said power theretofore exercised by any patron of presenting ministers to any vacant kirk. And to the effect the calling and entering ministers in all time coming may be orderly and regularly performed, it enacts, that the heritors and elders shall propose a person to the congregation, to be approved or disapproved by them. If they disapprove, they are to give their reasons, to the effect the affair may be cognosced by the presbytery, at whose judgment and by whose determination the calling and entry of the minister are to be ordered and concluded. And it enacts, that if application be not made by the elders and heritors to the presbytery, for the call and choice of a minister within six months, the presbytery may proceed to provide the said parish, and plant a minister tanquam jure devoluto; and it provides a certain compensation to

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the patron for the right of presentation thereby take away.

The act of Anne, c. 12., 1711, is entitled "An a "to restore the patrons to their ancient rights "presenting ministers to the churches vacant." recites, that by the ancient laws and constitution Scotland the presenting of ministers to vacant church did of right belong to the patrons, until by the a of 1698 the presentation was taken from the patro and given to the heritors and elders; and that that w of calling ministers had proved inconvenient, and h occasioned great heats amongst those who by that a were authorized to call ministers, and had been a gre hardship upon the patrons. It then repeals the act 1690, so far as it relates to the presentation of minist by heritors and others therein mentioned, and enact that in all time coming the right of all and every patro and patrons to the presentation of ministers to church and benefices be restored and confirmed to them, an act or statute to the contrary notwithstanding; and th it should be lawful for any person who had right patronage for any church to present a qualified minist and that the presbytery shall and is hereby oblig to receive and admit such qualified person as the perso or minister presented before the making of that a ought to have been admitted.

Such are the legislative provisions upon the subject contest in this cause,—the right claimed by the pu suers, and the power or duty claimed by the defende to belong to them, and to be regulated by the enactmen now in force, so far as such enactments support su rights or regulate such powers and duties. Other au thorities and other regulations may be resorted to, a

operative in matters not included in these enactments, but it can be of no effect as to any matter within them. What then is the true construction of such of these enactments as are now in force, resorting to the history of the time only for the purpose of explaining the expressions used in those statutes? In my opinion clearly this: that the patron's right to present was absolute, but to be exercised only in favour of a qualified person, of which the presbytery were to judge. If such was the right of the patrons under their statutable title, and such the power and duty of the presbytery, it is only necessary to inquire whether the act of 1834 has or has not interfered with their right; and whether the presbytery, in the course they have pursued, have or have not assumed a power beyond that which is given to them by the statutes.

In making this inquiry, it must be assumed that the presbytery were armed with all the authority which the general assembly could give to them. But if the general assembly had no power to pass the act of 1834, or to authorize the presbytery to follow its directions, the presbytery can derive no protection from it. The question, therefore, is as to the validity and efficacy of the act of 1834, but which properly arises between the patron and the presbytery. There appears, therefore, to be no ground for the objection raised, that the contest is with the general assembly, who are not represented in this cause.

What, then, was the act of the presbytery of which the patron complains? It appears from their proceedings as printed, that the presentation was duly made, and the form being, as I understand, the usual and old accustomed form, is not immaterial. The patron nominates

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and presents the minister to be minister of the grants to him the glebe and stipend, requires tl bytery to take trial of his qualification, literatu and conversation, and having found him fit and q for the functions of the ministry of the said ch admit and receive him thereto, and give him hi ordination and admission.

This form of presentation appears to me c to describe the rights of the patron and the duti presbytery as prescribed by the statutes.

This presentation with all the usual pape laid before the presbytery, they in so far sustai presentation as to find themselves prepared to a day for moderating in a call to the presen accordingly they appoint a day for that purpo the day appointed a call was produced, and s the usual manner. The presbytery then gav tunity for the male heads of families, whose nan on the roll, to give special objections, or dissen admission of the presentee. No special objecti given in, but it appears that a majority of the families whose names appear on the roll dissent

It was then moved that the presentee's ca signed only by three persons, was insufficie which a counter-motion was made, that the p refuse to act in terms of the motion, it being inc in that stage of the business. Which last mc carried; not an unimportant circumstance with to the argument, that in rejecting the pres presbytery were only adjudicating upon the s of the call.

At a subsequent meeting of the presbyte moved and seconded, that in conformity with

tence of the general assembly 1835, and the interim act of the general assembly of 1834, the presbytery do now reject the presentee, which the presbytery agreed to be determined in terms thereof.

It appears, therefore, that there never was any adjudication upon the call, but that the presbytery rejected the presentee, because a majority of heads of families whose names appeared upon the roll dissented. It is also clear that such rejection was not in consequence of any adjudication of the presbytery upon the qualification of the presentee; such adjudication can only be made upon the trial; but according to the form adopted the call must be sustained before the trials are proceeded with; and by the article 8. of the act of 1834 the presbytery was to proceed to the trials only in the case of the dissents not being those of a majority of persons on the roll.

Now, if it was the right of the patron under the statutes to present a qualified person, and if the presbytery were obliged to receive and admit such qualified person, which are the words of the statute of Anne, what possible right could the presbytery have to reject a person duly presented without any trial of his qualification, because a majority of the heads of families dissented? There is no such restriction upon the right of patronage and presentation in the statute, but, on the contrary, the right is unfettered and unlimited, except as to the person presented being qualified. Looking, therefore, to the statutes, as giving, or rather as securing and defining, the rights of the patron, it does not appear to me to be a matter of doubt that the presbytery in rejecting the presentee have acted in opposition to the provisions of those statutes, and in violation of the

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rights of the patron, which those statutes intended to secure. If the question had been as to the construction of those statutes simply, it does not appear to me to be possible that any serious doubt could have been entertained; and it may, therefore, be thought that I have unnecessarily occupied so much time in considering this part of the subject. I have been induced to do so from a conviction that a due understanding of the construction of these statutes must lead to an easy solution of the several collateral questions which have been fully discussed in the several stages of this cause and which have given rise to the difficulties which have been thought to belong to the question between the parties.

In considering these collateral questions I have therefore assumed that, according to the true construction of the statutes, there is thereby reserved to the patron the right of presenting a qualified person, and to the presbytery the right of trying his qualifications and the power of rejecting him if found not to be qualified.

If such be the construction of the statutes, of what purpose can it be to consider the supposed legislative power of the general assembly? For it cannot be contended that there can exist in the general assembly any legislative power to repeal, control, or interfere with enactments of the legislature. So that, even if the subject matter were found to be within the general legislative power of the general assembly, it would be powerless as to such subject matter so far as it is regulated by statute. It would therefore be beyond the powers of the general assembly to interfere with the right of the patron, as secured by statute, by adding to the powers of the presbytery.

But this legislative power claimed for the general assembly is confined to ecclesiastical matters, and it is insisted that the matter to which the act of 1834 applies is ecclesiastical. Now, although it is clear that if it were so the legislative power of the general assembly would be controlled by the statute, it is worth considering whether the matter in question can be considered as ecclesiastical. It is clear that there is nothing ecclesiastical in the right of presentation; that is a purely civil right; the adjudication upon the qualification of the presentee may be a matter ecclesiastical. But it is the right of presentation, and not the power of adjudication, which is affected by the act of 1834; not the power of adjudication, because that is to be exercised upon the examination and trials which, according to the proceedings of the presbytery in this case, following the directions of the act of 1834, have never been entered upon; but certainly the right of presentation, because, if that right consists in selecting the minister and calling upon the presbytery to admit him if found qualified, and for that purpose to examine and try him, it is a direct interference with that right to say we will not examine the minister presented, and though qualified we will not admit him if any other person or persons, be they who they may, object to him. Is it no infringement of a right to give to others a veto upon the exercise of it? As an argument in favour of the proposition that what the presbytery have done is matter exclusively of ecclesiastical cognizance, it has been contended that the ordination of a minister is part of the proceedings for settling him in the parish, and that the civil courts can, therefore, have no jurisdiction over any part of such proceedings. It is true that the ordi-

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nation in general takes place upon the settlement of the minister, but it seems quite clear that the two are altogether distinct. The ordaining may, and often does take place without any preferment, as when a minister is ordained for the purpose of becoming a missionary so a minister may be and often is settled in a parish without ordination, as when, having been ordained, a minister settled in one parish, he is transferred to and settled in another. Indeed the offices of ordaining the minister and of settling him in the parish are performed by different authorities; the first by members of the church only, the latter by the presbytery at large. But how can the interlocutor complained of interfere with the office of ordination, that takes place after the presentee has been put upon his trials, and found qualified, and no valid objection made? The discretion and duty confided to those who are to confer orders remain unaffected by the taking the presentee upon trials; which all that the interlocutor declares that the presbytery ought to have done.

But this consideration opens another objection to the act of 1834, as it enables the majority dissenting to interfere as well with the province of the church in ordaining the minister as with the right of the patron to present him. That the act of 1834 does in its operation interfere with the right of presentation is obvious; but it is contended that it does so indirectly only, and merely through the exercise of the ecclesiastical power of adjudication upon the qualifications; of which it is said that being acceptable to the parishioners is one, and that being objectionable to a majority of the heads of families is a disqualification.

I have already observed that the presbytery are de-

prived of this argument by the proceedings adopted. They rejected the presentee before the time arrived for adjudication upon his qualifications. But if it be clear, as it certainly is, that the qualifications referred to in the statute are personal qualifications, "literature, life, "and manners," there can be no ground for contending that the dissent of the majority of the heads of families is a disqualification within the meaning of the statutes. It cannot be so in substance, and it has not been so treated in form. How can the dissent of any person be a disqualification of the presentee, more than the want of a previous consent of the presbytery as attempted in 1596? If the presbytery have the power of imposing this obstruction to the exercise of the right of presentation, it is clear that there can be no limit but their own will to the obstruction which may be afterwards added; it can exist only at their discretion; they will have the power of appropriating it to themselves, or of giving it to others in defiance of the statutable title of the patron.

Another ground upon which the act of 1834 has been justified, and which is recited in it as the foundation of it, is, that it is a fundamental law of the church of Scotland that no person shall be intruded in any congregation contrary to the will of the people; and that the act is only an arrangement to carry that principle into effect. Whether that is or ever was a law of the church of Scotland is perfectly immaterial, if the statutes contain enactments and confer rights inconsistent with any such principle, or with the execution of any such law. The absolute right of patronage, subject only to the rejection of the presentee by the adjudication of the presbytery for want of qualification, which is secured by

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the statute, is inconsistent with the exercise of any volition by the inhabitants, however expressed. The second Book of Discipline, cap. 12., p. 9., says, "the "the liberty of election, so that none be intruded upon "any congregation by the prince or any inferior person without the assent of the people, cannot stand "with patronage and presentation." Therefore the reformers of those days sought to destroy patronage, but the legislature rejected the proposition and confirmed the law of patronage; and now it is contended that the power of rejection does not interfere with the civil rights of patronage and presentation. But how stands the evidence as to this being a fundamental law of the church of Scotland? It certainly is unfortunate for the argument in support of this supposed law that the 17th article of the act of 1834 is directly at variance with it, as it gives to the presbytery acting jure devoluto the power of appointing a minister without any reference to the wishes of the congregation. I am now inquiring what evidence there is of the principle of non-intrusion having been the law of the church; that it never was the law of the land sufficiently appears from the statutes I have referred to.

In the message of the general assembly to the Queen in 1565, there is no allusion to any such principle. The first Book of Discipline proposed that if upon open audience the minister be found unobjectionable in doctrine, life, and utterance, the congregation are unreasonable if they reject him, and that they should be compelled by the censure of the church to receive him; and this is not a violent intrusion.

In 1649, when the church enjoyed the patronage, they did not give the congregation the right of dis-

senting, but only of stating objections, of which the presbytery were to judge, which was the principle of the act of 1690, c. 23. No doubt many attempts have been made to destroy patronage and to introduce the principle of election in various forms; the attempts have failed. So far as the principle of non-intrusion is inconsistent with the rights of patronage secured by statute it could not be the law of the church; and in the instances referred to the principle has rather been to admit the congregation to state objections than to give them an arbitrary power of rejection.

Connected with this supposed law of non-intrusion is another of the arguments in favour of the act of 1834; that it is a regulation of the call, and that as the call is a matter ecclesiastical the church had the power to regulate it. To this the first and obvious answer is, that whether the provisions of the act of 1834 be or be not connected with the call, and whether the call be or be not part of the ecclesiastical function of admission, the general assembly had no right to make, and the presbytery, therefore, had no right to follow, any regulation inconsistent with the right of the patron as secured by the statutes. But it appears to me that there is no ground for connecting these regulations with the call; and that the call itself, whatever may be its origin or meaning, cannot be so used as to interfere with the right of patronage. The call is, in form, merely an invitation and request by the inhabitants subscribing it to the presentee to take upon himself the spiritual charge of the parish, promising to him all due respect, encouragement, and obedience. It is a request not to decline the office to which he has been presented; it implies no power or authority on those

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who subscribe it; it does not profess to be the act of the inhabitants at large, or even a majority. The act of 1834 does not treat the regulation prescribed for enforcing the veto as part of the call, although it directs such regulation to be put in force at the time of moderating in the call. If the majority disapprove, the presentee is to be rejected, but without reference to the call; and so the presbytery have acted, and their acts have been approved by the assembly: for it not only appears that the presentee was rejected without any adjudication upon the call, but after it had been finally ascertained that a majority dissented. Upon a motion being made that the call was not good and sufficient, they refused to act in the terms of the motion, as being incompetent in that stage of the business, and their next act was to reject the presentee upon the ground of the dissents, without any reference to the call. And this is not only admitted to be so by the defenders, but is one of the arguments urged against the jurisdiction of the Court of Session, the call being, as it is said, a matter ecclesiastical, and there having been no adjudication upon the call. Under these circumstances there seems to be no ground for justifying what has taken place under the act of 1834 as a proceeding in moderating in the call. But if this were otherwise, can it be maintained that it can be used in such a manner as to prejudice a right secured by act of parliament; and above all, that it can be altered from a form in that respect innocuous, so as to produce that effect? Whether the call be considered matter ecclesiastical or not, it must be subject to the control of parliament, and must be accommodated to the provisions of its enactments. If it existed before the act of 1711 in a form to inter-

fere with patronage, it was so far restricted by that act. Considering, however, the arguments which have been urged in this case upon the subject of the call, it seems necessary to inquire in some degree as to its apparent origin and nature.

The term seems first to occur at periods when the early reformers were struggling for the election of ministers. The acts of 1567 and 1592 negatived this claim; but the struggle continued, and at different times subsequently it was attended with success; and in the act of 1690, by which patronage was for a time destroyed, the expression "calling and entering" ministers is used, the calling being apparently put in opposition to presenting; and in the act of 1711, by which patronage was restored, there is no longer any mention of "calling;" but the patron's right to present, and the presbytery's duty to receive and admit a qualified person so presented, are the only acts referred to as incident to filling the vacant churches. The act of 1649 uses the term "call" in the same sense as the act of 1690; it declares the title of a minister valid who upon the suit and calling of the congregation, after due examination of his literature and conversation, shall be admitted by the presbytery, though he have no presentation.

If, then, the call was what the reformers were desirous of substituting for patronage when the latter was finally established by the act of 1711, the call could only be continued as a form; and if before that time it was only to be substituted for the civil right of patronage, why was not the substituted right to be of the same character as the original? Why, if the patronage was a civil right, was the call to be a matter ecclesiastical?

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Both were the exercise of the right of selecting the individual and bringing him to the church for examination and admission. Till the person selected was presented or called, and brought to the church, the ecclesiastical jurisdiction does not appear to have commenced. It is true that many instances have been produced of questions as to the validity of the call having been brought before the assembly from the decisions of the presbytery; and if in any of those cases the result had been that the patron had been deprived of the benefit of his right of presentation by a final judgment of the assembly that the call was insufficient, it would no doubt operate as a case in which the individual patron had acquiesced in the jurisdiction of the assembly. But if no such case can be produced, and on the contrary, the result of the appeal to the assembly has been either a settlement by arrangement, or a decision in favour of the patron against the prior proceedings of the presbytery, of which the case of Dunfermline, in 1752, is a remarkable instance, then the fact of no case upon this point having been brought before the civil tribunal is fully explained.

It appears, indeed, for many years after the act 1711 the difficulties thrown in the way of the patrons were such that their rights were but sparingly enforced but it is admitted that in all the latter times the decisions of the assembly have been in favour of the patrons; holding any call to be sufficient, and thereby treating it as a mere form. It is impossible too highly to praise the good sense of those distinguished members of the church, who, seeing that the law was against them, avoided giving offence to their less discreet brethren by preserving the form of the call, but at the

same time so dealt with it as not to let it interfere with the right of the patron, and thereby avoided a collision, in which it was certain that the church must have been defeated. I cannot, therefore, consider the proceedings which have been produced from the records of the assembly respecting calls as of any weight upon the present question. They cannot be of any weight except when they show acquiescence in the jurisdiction by the patron; for, as acts ascribing a jurisdiction to the assembly itself, they can only be classed with such proceedings as the assembly adopted in 1596, and 1638, and 1736; they attempted to establish rules as to patronage, in direct opposition to the provisions of existing statutes; and looking to the proceedings of the assembly itself down to the year 1834, they exhibit, indeed, in the earlier times a struggle against the right of the patrons as defined by statute, but afterwards a gradual acquiescence in those rights and submission to the law.

The second Book of Discipline had declared the obvious truth that patronage and election could not stand together. An effectual call is equally inconsistent with patronage; and the church therefore most properly treated any call as sufficient. I do not, however, think it necessary to express my opinion upon the origin or the effect of the call, except so far as the use of it may interfere with the rights of the patron as secured by statute. With such rights the call in its original form could not have been permitted to interfere; no new regulations inconsistent with those rights can be legal; they can give no authority, from being clothed with the name of a call, from which in form and substance they entirely differ.

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It has been suggested by the highest authority th the act of 1711, in enacting that the presbyteries sh receive and admit the persons presented by the l patrons, in the same manner as the persons or minist presented before the making of this act ought to h been admitted, intended to have preserved the fo prescribed by the act of 1690, c. 23., for the purp of enabling the congregation to state objections to presentee for the consideration of the presbytery, subject to being overruled by them. If that should the right construction of the words in the statute Anne, it would not affect the present question. T part of the provision of the act of 1690 would be c sistent with what has been often contended for as a pr course, and what, in form at least, prevails upon o nation in England and in Scotland. It would, effect, only add to the facilities of the presbytery judging of the qualifications upon the trials; but it h no resemblance to the provisions of the act of 18 which, instead of giving an opportunity to the inha tants to state objections which the presbytery may d regard, enables a majority, by dissenting without a reasons stated, to deprive the presbytery of the power c adjudicating upon the qualifications of the presentee.

It is therefore unnecessary to express any opinio upon this point; but to guard against misapprehensio I will only say that there appear to me to be difficulti to be overcome before this construction of the statute o 1711 can be adopted, of which I have not been able t find any solution. It is sufficient for the present purpo to observe, that if that be the true construction of th act of 1711, the act of 1834 would be equally a invasion of the right of the patron. I cannot, therefor

hesitate to declare my decided opinion that the proceedings of the presbytery founded upon the act of the assembly of 1834 amount to an illegal interference with the right of the patron as secured by statute, and that a wrong has thereby been sustained by the pursuer.

The next subject for consideration is the remedy for this wrong, and before I apply myself to the consideration of the objections which have been made to the proceedings of the Court of Session for this purpose, I must make some observations upon an argument of a more general nature urged on the behalf of the defenders; which, if well founded, would, in effect, give to the general assembly a legislative power uncontrollable even by parliament, and would exhibit a case, I will not say of wrong, as that would be a contradiction in terms, but of a serious deprivation of valuable civil private rights without the possibility of redress.

It is argued, that although the right of presentation belongs to the patron, yet that every thing connected with the admission of the minister after the presentation is by law subject to the jurisdiction and direction of the church; that the general assembly has legislative power to make what regulation it thinks fit upon that subject; and that no complaint can be made of any thing done by the presbytery relative to the admission of ministers, but to the superior ecclesiastical courts, that is, ultimately, to the assembly. The result would necessarily be, that the assembly in its legislative capacity might make laws destructive of the right of patronage, and, having sole jurisdiction over the execution of its own laws by the inferior jurisdictions, no means would exist of questioning the legality of its enactments. This is but a mode

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of describing pure despotism; if any such power had existed in the church, the struggle against patronage continued through so many years could not have been unsuccessful. Whatever parliament might have enacted, the general assembly had only to enact laws of its own inconsistent with the enactments of parliament, and it itself to have enforced the execution of them. It could not have failed to have effectuated what it attempted in 1596 and 1638, by accepting the presentation, but enacting that the presbytery should not proceed to admit the presentee unless he had previously received the consent of the assembly. From a rejection by the presbytery upon this ground there would, according to the argument, be no appeal or means of redress but by application to the general assembly, who, supporting the act of the presbytery in the execution of their own enactment, would at once transfer the right of patronage from the lay patron to the presbytery.

However extravagant this proposition may appear to be, it is necessarily included in the argument for the defenders. If the presbytery may agree not to receive or to act upon a presentation, because a majority of heads of families dissent, why may they not do so because a majority do not assent at a meeting held for that purpose, which is election, or because a majority of the presbytery do not assent, which is in effect the usurpation attempted in 1596 and 1638? In all these cases the violation and destruction of private civil rights would be effectual, because the only remedy, according to the argument, would be by application to the authors of the wrong. Nothing can be farther from my wishes than to treat lightly the opinions which have been expressed by any of the very learned and able judges

who dissented from the judgment of the Court of Session, but it is impossible to do justice to the case without following out these opinions to what appear to me to be their inevitable results.

Those who contend that there is no remedy for the wrong which has been committed in any existing law, suggest that redress can be obtained only by application to parliament. But if the right be already established by statute, and if the wrong consist in a violation of the right so resting upon the authority of parliament, it is not easy to conceive in what manner parliament may be able hereafter with more success to secure the objects of its enactments; certainly not without a more direct and important interference with the powers legislative and judicial claimed by the assembly than the judgment of the Court of Session can be supposed to effect.

It is said, however, that the legislative power claimed for the assembly has itself the authority of parliament as its foundation, because the statute of 1567, c. 7., after giving, to the patron who presents a person qualified to his understanding to the superintendent of the kirk, an appeal to the superintendent of the province, and from him to the general assembly if the person presented be not received and admitted, declares that the cause, being decided by the court of assembly, shall take end as they decern and declare. That which is the subject matter of appeal is to take end by the decision of the general assembly. What that subject matter is appears from the earlier parts of the statute, namely, the examination of the person presented, qualified according to the understanding of the patron. As to his qualification and his subsequent admission, a duty is to be performed after taking the presentee upon his trials, and which can have

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no reference to a rejection of him, not for want of any qualifications, but by the dissent of an authority interposed to the prejudice of the patronage, which it was the object of that act to protect. It is not disputed that as to matter of qualification, which is submitted to the decision of the church, the judgment of the assembly upon appeal is final. It has also been suggested that the provisions in the act of 1592, that the presbytery are to "put order to all matters and causes ecclesiastical "according to the discipline of the kirk," amounts to a direct committal of all ecclesiastical affairs, and amongst those every thing connected with the admission and collation of ministers, to the exclusive jurisdiction of the church courts. But in this suggestion the proviso which immediately follows is overlooked, which provides that "the aforesaid presbytery be bound and astricted to "receive and admit quhat-sumever qualified minister pre-"sented by His Majesty or laick patrons;" by which it is clear that the presentation was not a matter ecclesiastical as to which the presbytery were to put order, but that they were to be bound to receive and admit a qualified person presented to them, whatever order they might put to any matters or causes ecclesiastical. This act, so far from authorizing the presbytery to make regulations interfering with the right of patronage, prohibits them from so doing.

It was urged that many acts of the church have been acquiesced in, in regulating the qualifications of ministers as to education, knowledge, and other matters, and this is true; but all these concern the personal qualifications of the presentee, to be judged of by the presbytery upon the trials, leaving the right of presenting a qualified person untouched. The statutes give to the patron the

right of presentation, and to the church the power and duty of adjudicating upon the qualification of the presentee. The act of 1834 introduces a new authority, which destroys both; the dissenting majority, defeats the presentation of the patron, and prevents the adjudication of the presbytery. If, then, the civil right of presentation has been invaded by the proceedings of the presbytery founded upon the act of 1834, and if the statutes have not deprived the civil courts of the ordinary power of giving redress for invasion of civil rights, it will require strong authority to show that the Court of Session has not jurisdiction to take cognizance of this complaint, which is this: that the patron having by law and statutes a right to present a qualified person to the presbytery, who are by statute bound to receive and admit him, unless found upon examination by them not to be qualified, the presbytery have refused to receive and admit him without any examination or adjudication as to his qualifications; that is, they have refused without any justifiable reason to give effect to the presentation. Now, I understand it to be admitted, that if the presbytery were simply to refuse to receive or to act upon a presentation, or if they were proceeding to present themselves jure devoluto before the proper time had arrived, the Court of Session would have jurisdiction to interfere. In all these cases there is the same injury inflicted by the same act, namely, the refusal to give effect to the presentation, and as the cases only differ as to the grounds of the refusal, which are in all assumed to be untenable, it seems extraordinary that there should be jurisdiction in some of the cases and not in all. It is extraordinary, certainly, when the long-protracted struggles are considered between the patron and the church, that

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so few cases are to be found in which the interposition of the Court of Session has been applied for, but such cases as have been produced appear to me to be very decisive upon the question of jurisdiction.

In the Auchtermuchty case [1], in 1733, the presbytery had rejected a person presented by a lawful patron without examination, and were proceeding to admit another; this was affirmed upon appeal to the assembly. The rejected presentee applied to the Court of Session by advocation, that the settlement should be stopped until the right was decided; the Court sisted the proceedings, but the presbytery having proceeded, a petition and complaint were presented against them when certain of their number appeared at the bar and apologized. The presbytery admitted the person not presented, and the cause having proceeded, an interlocutor was pronounced, "finding that the presbytery "refusing a presentation duly tendered in favour of "qualified minister, against whom there lies no leg "objection, and admitting another person, the patro "has a right to retain the stipend, and, therefore, fin "ing the reasons of suspension relevant."

Many of the arguments urged in this case were use in that; but the result was, that before the wrong minister was admitted, the Court of Session acted against the presbytery by sisting their proceedings; but after he was admitted the remedy applied was necessarily confined to the stipend. Under both circumstances the Court exercised its jurisdiction.

In the case of Dunse [2], in 1749, the presbytery, disputing the patron's title, rejected his presentee without

[1] Mor. 9909. [2] Mor. 9911.

any adjudication upon his qualification. The patron insisted in a process of declarator against the presbytery in the Court of Session, which by its interlocutor, declared that the pursuer had a sufficient right to present, and that the right had not fallen to the presbytery tanquam jure devoluto. This interlocutor was reversed in this House, but for want of parties only, and in terms, without any judgment upon the merits. It is said, that the court refused to interfere to prevent the presbytery settling any other person, because that was interfering with the power of ordination, and the internal policy of the church, with which the lords thought they had nothing to do. Whether this be correct seems doubtful, but the case is at all events an authority of the Court of Session in a process of declarator establishing the right of the patron to present against the presbytery.

In the case of Culross[1], the presbytery rejected the patron's presentee, disputing his title, and settled another minister. The patron instituted proceedings for the stipend and succeeded, but the church being full the presbytery were not made parties, so that this case does not bear much upon the present.

In the case of Lanark[2], in 1752, the Court of Session, finding that the presbytery had admitted the wrong person, adjudged the stipend to the patron of the rejected presentee. In that case also the presbytery were not parties.

But in both the Kiltarlity cases[3], the presbytery were parties. The first was a case of suspension and inter-

[1] Mor. 9951. [2] Mor. 9954.

[3] 1 Sh. & B. 363., or 340 (new edit.), and 2 S. & D. 384., or 341 (new edit.)

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dict at the instance of certain parishioners to prohibit the settlement of a presentee. Two grounds of defence were pleaded: first, that it was incompetent by suspension and interdict to interfere with the proceedings of the presbytery in the settlement of a minister; and second, that the pursuer had no title to pursue. The court repelled the objection to the competency, as the question regarded the civil right of patronage, but decided in favour of the second defence.

In the second case of Kiltarlity the presbytery, having sustained a presentation, was held to be barred from objecting to it, and refusing to proceed to settle the presentee. This case also affords an answer to an argument much urged on behalf of the presbytery that, as they had received the presentation, all that remained was purely ecclesiastical, whereas it appears from their proceedings that they avoided sustaining the presentation. They only in so far sustained it as to find themselves competent to appoint a day for moderating in the call; if they had sustained the presentation they would, according to the second Kiltarlity case, have been barred from refusing to proceed to settle the presentee. There has, therefore, been a refusal to sustain the presentation, which brings this case precisely within the others referred to, in which the presbyteries have been parties.

In the case of Lord Dundas[1] v. the Presbytery of Zetland and Gray, the presbytery rejected a presentation of the presentee of the patron, and settled another minister. The court decided in the terms of the declaratory conclusions, which were, that the presbytery

[1] Mor. 9972.

which had illegally rejected the presentation should give due obedience to it, according to the rules of the church.

In the cases of the presbytery of Falkirk v. Lord Callander[1], 8th December 1696, the Presbytery of Ayr v. Lord Dundonald[1], the Presbytery of Paisley v. Erskine[2], and the Presbytery of Strathbogie v. Sir Wm. Forbes[3], those were all actions brought by presbyteries against patrons, to have it declared that the right of presentation had devolved to them jure devoluto. It is admitted that if the presbytery assumes the jus devolutum when the patron thinks it has not fallen, he has a remedy in the civil courts, and that in all cases of disputed patronage and of stipend the court has jurisdiction. From these authorities it is clear that the Court of Session has jurisdiction to adjudicate upon the right of patronage, and to correct any infringement of it as against another claiming adversely, and against the presbytery, whether claiming adversely jure devoluto, or simply rejecting without cause the presentee of the patron, as in the cases of Auchtermuchty, of Dunse, of Kiltarlity and Zetland, and the other cases referred to.

It is admitted that the court has jurisdiction as to the stipend after the admission of a minister by wrong. It would be strange if the jurisdiction could be exercised only after the evil had been completed, when the Court has jurisdiction to prevent it;—that it has jurisdiction when a wrong minister is admitted, but not when the right minister is rejected.

It appears to me for these reasons, that in this case a civil right has been violated by the presbytery, and that

[1] Mor. 9961. [2] Mor. 9966. [3] Mor. 9972.

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the court has jurisdiction to take cognizance of the injury committed. It remains to be considered, whether there be any thing objectionable in the form of the proceedings, or in the interlocutor appealed from.

It was much relied upon in the court below, but not so much insisted upon here, that the act of 1834 has not been properly put in issue by the pursuer; that the summons states and complains of that which is the real grievance to the pursuer, that which constitutes the injury to his right of patronage, namely, that the presbytery rejected his presentee without trial or taking cognizance of his qualifications, and expressly on the ground of the veto of the parishioners.

The act of 1834 constitutes no part of the pursuer's case, and cannot justify the proceedings of the presbytery according to the case made in the summons; and if by law it does justify their proceedings, it is properly left to be brought forward by the defenders who rely upon it as consequential upon the case so stated. The summons prays a declaration of the plaintiff's right, and of the wrong which he alleges has been done to it, and certain specific relief as a remedy or compensation for such alleged wrong. It is not disputed that it is competent for the court upon a summons having petitory conclusions to confine its interlocutor to a declaration of right. That is what the interlocutor appealed from has done. The cases prove that when the presbytery has illegally rejected a presentee, the Court of Session exercises jurisdiction against the presbytery. What relief may ultimately be administered to the patron in that or in any other suit is not now the subject for consideration. If the court has jurisdiction over the subject matter, and over the parties defenders, it is clearly

according to its practice to declare by its interlocutor the right of the pursuers without proceeding to administer any remedy for the wrong it has sustained.

The result of the anxious consideration I have given to this case is the conviction, that the presbytery in the course they have pursued have violated and done wrong and injury to the patron's right of presentation, that the Court of Session have jurisdiction to take cognizance of that wrong, and that in the interlocutor they have pronounced there is no departure from the ordinary mode of exercising their jurisdiction, of which the defenders are entitled to complain.

In forming the opinions I have now expressed, I have confined myself to the questions of law which arise upon the pleadings between the parties. Such is the duty which I felt I had to perform as one of the judges of this the highest tribunal in the country. I have in doing this had no regard to the feelings which this controversy has excited in Scotland, and I have not permitted myself to consider the consequences which may follow from the judgment of this House, on whichever side it may be given. But having now discharged the duty of delivering my opinion upon the matter in contest, I may, before I conclude, be permitted to express the high respect I have always felt for the clergy of Scotland. Much as has been said in their praise, I am satisfied that they deserve it all; and that the parochial duties are in general performed in a manner the most exemplary and beneficial for the inhabitants.

If there be any feeling in the church still remaining that the exercise of private patronage is detrimental to the well-being of the establishment, and that it tends

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to diminish its usefulness to the people, let it be remembered that the high character the clergy have attained, and the beneficial influence the church has exercised, have arisen, or at least been matured, under a system of lay patronage.

If your Lordships shall concur in the opinions I have expressed, and by your decision inform the clergy of Scotland what the law really is, I cannot doubt but that they will by their conduct and example inculcate the sacred principle of obedience to the law, of respect for the rights and interests of others, and of the sacrifice of private feelings to the performance of a public duty.

I again move your Lordships that the interlocutor appealed from be affirmed.

Ld. Brougham's Speech.

LORD BROUGHAM.—In again calling your Lordships attention to this case, I have only to state the great satisfaction which I feel, in finding that my noble and learned friend's view of the subject, and the grounds of his opinion,—an opinion which we have separately come to together,—are precisely the same which had presented themselves to my mind after the anxious attention that I bestowed upon this case. But I should not have troubled your Lordships with one word at present, except from the circumstance of my not having taken the precaution, which my learned friend has most properly done, of committing to writing my argument in giving judgment. The reason is not that I have at all altered my opinion of the great expediency, and in important cases almost the necessity, of pursuing this course which my learned friend observes I always did when I filled the situation, which he now much more worthily fills, in

the Court of Chancery, and which I have done also here and at the Privy Council. My opinion is precisely the same as it always was, of the expediency of pursuing that course. My only reason for deviating from it in the present case is, that I had not time, and, therefore, in the choice of difficulties, I thought it better to state my opinion without writing, than to delay the judgment so long as would have been necessary to enable me to commit it to writing. My Lords, had I done so, I undoubtedly should not have omitted a part of the subject to which my noble and learned friend has very properly directed your attention in the close of his judgment, that is, to the question of pleading. It is fit that I should now say that that had not escaped me, though it did escape me yesterday. I quite agree with my noble and learned friend that the pleading is correct in this case, and that it was not at all necessary to plead the act of 1834 of the general assembly. The argument which would maintain the necessity of pleading the act of the general assembly, at least if there is any similarity in the rules of pleading in Scotland to our rules, would be a complete abandonment of the legislative power of the general assembly; for if they had any power to make laws, nothing like good pleading would require the pleading of those upon the record. But, however, upon another ground, I agree, that it is not at all necessary. I equally agree that the judgment of the Court below upon the declaratory part of the summons is right.

Judgment affirmed.

Appellant's Authorities.—Thomson's edit. of Scots Acts, vol. ii. p. 534, stat. 1567, c. 3; Book of Kirk, MS. 468, Peterkin's edit. p. 115, 116; MS. 493, 494; stat. 1557, c. 36; Ersk. b. i. tit. iii. sec. 10; stat. 1567,

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c. 6; 1579, c. 68; 1567, c. 31; Erak. b. i. tit. v. sec. 24; stat. 1567, c. 7; 1579, c. 69; 1581, c. 99; 1584, c. 129; 1592, c. 114; Book of Kirk, pp. 11. 12. 15; stat. 1592, c. 117; 1612, c. 1; 5 fol. Acts, 298; 6 fol. Acts, 364, 411; stat. 1662, c. 1; 1669, c. 1; 1690, c. 1, 2, 5, and 23; Treaty of Union, 1705; stat. 1706, c. 6; Forbes, Tithes, 49; Erak. b. i. tit. v. sec. 16; (Dunse Case) 5 Bro. Supp. 768; Morren's Annals, 145, 152; Moncreiff v. Maxton, 15 Feb. 1735, Mor. 9909; (Culross) Cochrane v. Stoddart, 26th June 1751, Mor. 9951; (Lanark) Dick v. Carmichael, 29th Feb. 1752, Mor. 9954; Moncreiff's Life of Erskine, 533; Kiltarlity Case, 1 S. & D. 363; Peterkin's Compend. *passim*; Hill's Church Practice, 57, 2d edit. p. 65; Bell's Decis. (1794), p. 170; Gibson v. Barons of Exchequer.

Respondent's Authorities.—Stat. 1592, c. 116; 1690, c. 23; 10 Ann, c. 12; 2d Book of Discipline, c. 3. sec. 4, 6; Directory for Worship, 1645; Ord. of Min., Acts of Assembly, 1649, sec. 2; 5 Geo. 1. c. 29, sec. 9; Stair, b. iv. tit. iii. sec. 47; Bankton, b. ii. tit. viii. sec. 62; Erak. b. i. tit. v. sec. 16; Dunlop on Patronage, ch. 8, sec. 283; Haddington, 31st July 1680, Mor. 9903; Lady Forbes, Feb. 1762, Mor. 9931; Lord Dundas v. Nicolson, 15th May 1795, Mor. 9972, and Bell's Cases, p. 169; Baillie and others, 28th Feb. 1822, 1 S. & B. 363, or new edit. 340; Presbytery of Inverness, 10th June 1823, 2 S. & D. 384, or new edit. 341; Presbytery of Falkirk, 8th Dec. 1696, Mor. 9961; Paisley, 10th Aug. 1770, Mor. 9966; Strathbogie, 2d Aug. 1776, Mor. 9972, App. voce Patronage, No. 2.——(*English.*) Specot's Case, 5 Coke Rep. 57 (b), 58 (a), qualified by Heale v. B. of Exeter, Shower's Cases in Parliament, 88; Albany v. B. of St. Asaph, Cro. El. 119; King v. B. of London, 13 East, 419; S. C. 15 East; King v. B. of London, 1 Wils. 11; King v. Mayor of Stratford on Avon, 1 Levinz, 191; 1 Bla. Com. 389 (Coleridge's edit.); Collifatt v. Newcomb, 2 Lord Raym. 1205; King v. Blower, temp. 1st Lord Mansfield, 2 Burr. 1045; 3 Bla. Com. 101, citing 2 Inst. 623; Rex v. Campion, 1 Sid. 14; Regina v. Bailiffs & Burgesses of Ipswich, 2 Lord Raym. 1233; Ashby v. White, 2 Lord Raym. 938; S. C. 14 How. St. Tri. 695; S. C. on Error in House of Lords, 2 Lord Raym. 958.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Solicitors.

[*7th May* 1839.]

Appeal from the Court of Session, Scotland.)

RICHARD ALEXANDER and others, Appellants.[1]— *Sir F. Pollock—Tinney.* (No. 10.)

Colonel C. S. MACALISTER and others (Caledonian Dairy Company Directors), Respondents.—*Knight Bruce—Pemberton.*

Partnership—Joint Stock Company—Contract.—In an action by directors of a joint stock company against the other solvent partners, for relief of advances and obligations by the directors personally in the management of the affairs of the copartnery, Held, upon construing the contract of copartnership, (affirming the interlocutors of the Court of Session,) that the following defences ought to be repelled; (1.) that the partners were only liable, inter se, to the amount of the sums severally subscribed by them for and as their shares in the said copartnership; (2.) that the directors had no right to begin business, and no power to bind the partners for any debts or obligations on behalf of the said company, till the whole stipulated capital had been subscribed for and secured; and (3.) that the powers of the directors to borrow money on the responsibility of the company and the partners were restrained.

Practice.—Held that the Court may, before exhausting the whole pleas of the parties, lay down certain principles, by declaratory findings, which shall regulate the future proceedings in a cause, and be the foundation of ulterior findings, the consideration of which may be reserved.

[1] Reported 15 D., B., & M., 1061.

2d Division.

Lord Ordinary Jeffrey.

Statement.

IN the year 1824 the respondents were among the original projectors of a scheme, and issued a prospectus, for the establishment of a joint stock company for supplying the inhabitants of Edinburgh with milk and other dairy produce; the capital stock of the company was to be 50,000*l.*, to be raised by subscription, and divided into shares of 25*l.* each. The committee of management purchased the lands of Wheatfield near Edinburgh for 12,000*l.* "A meeting of subscribers" was held on the 2d February 1825, at which directors were named, and resolutions passed, so as to constitute the company, the capital of which it was resolved should be 50,000*l.*, divided into 2,000 shares of 25*l.* each. The directors were authorized to complete the purchase of the land requisite for the undertaking, and to erect suitable accommodations. A report read by the committee set forth, that the whole capital had been subscribed for; and the thanks of the meeting were voted to the committee for the purchase of Wheatfield. The secretary was directed to prepare a deed of copartnery. The lands of Meadowbank and an adjoining piece of land were soon afterwards purchased for 9,700*l.*

Thereafter a contract of copartnery was settled and approved of by the directors.

By the first article it was declared, that the copartnership should be held to have commenced from and after the 28th January 1825; and it was further declared, that the subscribers should "have right to the "profits, and be liable for the losses, arising from or "upon the said business, and should be bound to relieve "each other of all the debts and engagements of the "company, but that only to the extent of and in pro-"portion to their respective shares therein."

By the second article it was provided, that the subscribers should have "right to the profits and be liable "for the losses of said business, and should be bound "to relieve each other of all the debts and engagements "of the company, in the proportion of their respective "interests or shares in the capital stock."

By the fifth article it was declared, that nine ordinary directors should be chosen; and that as certain gentlemen named formed the interim committee of management, and as it would require some time to arrange completely the details of the management, and agreeably to the resolution and minute of the general meeting of shareholders, of date the second day of February last, it was thereby declared, that William Trotter, Esquire, &c. should be nominated and appointed directors of the concern, and should continue in that office from the date of the contract, and for two years from and after the last Monday of May thereafter.

It was provided by the eighth article, "that the "whole account books, papers, letters of correspon- "dence, and other writings relative to the business of "the company shall at all times be open to the "directors and superintending committee and mem- "bers thereof respectively, but to no other members of "the company, unless ordered by the annual general "meeting; and also that the directors shall have full "power to make the purchase of land, ground, or "other premises which they shall deem necessary for "the concern, and are hereby authorized to complete "and carry into effect the purchases made of the lands "of Wheatfield and Meadowbank, and to take all "requisite measures for the erection of suitable accom-

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" modations for the dairy establishment, and to enter " into all contracts or deeds necessary in the concerns " of the company, and otherwise to carry into effect " and execution the objects of the company, and to " take all such steps as to them may seem expedient " and beneficial in forwarding the prosperity of the " establishment; and according to their sound dis- " cretion, to dispose of the lands of Wheatfield, or feu " them; and also to feu such parts of Meadowbank, " from time to time, as they think proper;" and further, " that the power of the directors, in the above " mentioned and all other particulars, shall be subject " to such limitation, extension, or alteration as a " general meeting shall think fit; all which acts of " administration shall be effectually binding and " obligatory upon the company, and whole individual " partners thereof; that it shall be in the power of " the directors to borrow money, on the credit and " security of the company, to the extent of three thou- " sand pounds sterling, which they are hereby em- " powered to do, by way of cash account with some " bank or banking company, provided there is stock of " the company subscribed for and unpaid to that " amount."

It was provided by the ninth article, " that the sums " effeiring to the number of shares subscribed by the " members of the said company respectively shall be " advanced and paid in such instalments as the " directors shall see proper to call for, and that in such " mode, and at such times, and to such amount as they " shall think proper, upon premonition of one month " before the term of payment being given to the " subscribers respectively, by letter addressed to each

"of them, signed by the secretary and put into the "general post office of Edinburgh, with legal interest "of such part of said share so called for from the date "fixed for payment, and until payment thereof is "made; and in no event shall it be in the power "of the directors to call upon the partners for a sum "beyond that subscribed for by them respectively."

By the eighteenth article it was provided, "that a "stated account, made out from the books of the "company, and subscribed by the accountant and "secretary, shall in all cases be sufficient to ascertain "and constitute a balance and charge against a partner "of the company, and no suspension shall pass of a "charge so constituted, but upon consignation only."

The twentieth article declared, "that the directors "shall not be liable for omissions, nor for the suffi-"ciency or responsibility of securities or property on "which they may lend out or otherwise invest the "funds of the company, nor for the actions or intro-"missions of the manager, banker, clerks, or accoun-"tant, or any other officers or agents of the company, "or any other persons intrusted with the business of "the company, nor shall they be liable in solidum nor "pro rata for one another, but each only for his own "actual intromissions."

And the twenty-first article requires, "that each of "the partners shall assign to the company, and the "directors thereof for the time being, his own par-"ticular share and profits of the concern, in security of "the debts and engagements of the company."

It is provided by the twenty-third article, "that "previous to the last Monday of May eighteen hundred "and twenty-six, on which day the general annual

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"meeting of the stockholders is to be held, and in "every year thereafter, the books of the company shall "be balanced, and a statement or abstract of the "company's affairs shall, under the inspection of the "directors and auditors, be made up and signed by "the accountant of the company and secretary; and "no transfer of the stock shall be admitted or entered "in the books of the company for three weeks previous "to the said last Monday in May, nor till eight days "thereafter, yearly; and the directors, or their account- "tant or secretary, shall be obliged to lay upon the "table, at the said general meeting to be held upon "the said last Monday of May yearly, the said state- "ment or abstract, for the inspection of the partners "present, the substance whereof shall be stated at the "said court by the chairman or preses; and the said "statement or abstract shall lie at the office of the "secretary, open for the inspection of any of the "partners, for the space of one calendar month sub- "sequent to the said last Monday of May."

Thereafter the contract was subscribed by share- holders, to the extent of 20,000*l.* The directors, while it was in the course of subscription, took measures for the erection of the necessary buildings, the contract price being about 5,400*l.*, though they ultimately cost about 9,000*l.*

There having been a previous call of five per cent, a call of ten per cent. was made upon the shareholders in June 1825, and another call to the like extent in July following, but the calls were only partially paid, the sum thereby realized was inadequate to meet the engagements of the directors, and they borrowed money to pay the price of the lands purchased and for the

current expenses, partly on their own individual security and partly by heritable bond over Meadowbank, by some of their number as trustees for the company.

The first general annual meeting of the proprietors of the company took place on the 29th of May 1826, and was attended by the principal shareholders, including the directors. A report was submitted by the directors, and approved of, containing a full statement of the affairs of the company up to that date, and of the various arrangements which had been made for the completion of the purchases of the several heritable properties, the nature and terms of the building contracts into which they had entered for the erection of the premises at Meadowbank, and the state of progress of these buildings, which were then almost completed. The directors also explained, that "although names were put down for 2,032 shares, "amounting in sterling money to 50,800*l.*, of which "the directors allocated 2,000 shares, yet the contract "was only signed by proprietors to the amount of 806 "shares, being 20,150*l.*" The report set forth the difficulties which the directors had experienced in carrying through the different pecuniary and other arrangements, from the delay on the part of many of the subscribers in paying up their instalments.

The meeting authorized these directors "to adopt "such farther measures, from time to time, as they "may consider necessary for promoting the prosperity "of the concern."

The affairs of the company became more involved, and the management more difficult, the subscribing partners declining to pay their different calls on the subscribed capital. The directors had to raise money

[illegible] their personal estates. [illegible] were sent to [illegible] and [illegible] the different trades [illegible] of [illegible] the [illegible] of [illegible] the [illegible] of the [illegible] in the [illegible]

[illegible] meeting in [illegible] it was stated [illegible] the affairs of the company. It appeared [illegible] the affairs of the company, [illegible] [illegible] account, that a total loss [illegible] [illegible] as at [illegible] of [illegible] [illegible] and other deficits to the amount of [illegible] [illegible] received and applied [illegible] [illegible] there remains a deficiency beyond [illegible] capital and the estimated property [illegible] of the company of £1,611 16s. 8d. [illegible] from the whole of the above-mentioned [illegible] [illegible] from the fair value of the heritable properties [illegible] go below their original cost, joined to the [illegible] interest on the prices and the expense of the [illegible] arising out of the purchase of those [illegible] The directors, or those in whose right they now [illegible] have made large advances from their own private [illegible] for the purpose of liquidating the debts and obli[illegible] of the company. The total amount of the outst[illegible] debts of the company, in so far as the same has [illegible] ascertained, including the advances made b[illegible] directors, and advances by certain others [illegible] partners, for the company's behoof, and in exti[illegible] of its obligations, was then 24,504*l.* 10*s.* 3½*d.*

The defenders (appellants) who, besides the r[illegible] dents, were the remaining solvent partners [illegible] copartnery, having refused to contribute, with [illegible] to make up this deficiency, an action was raised [illegible]

them in the Court of Session. It proceeded in the name of the pursuers (respondents), "all directors and "individual partners of the Caledonian Dairy Com- "pany," some of whom were also designed "as "trustees nominated by the directors of the said "company, and vested with the heritable property "thereof, with consent and concurrence of Carlyle "Bell and Alexander Cuninghame, Esquires, writers "to the signet, as vested, in manner after mentioned, "with the right to the debts and obligations after "referred to." The summons then recited the establishment of the company,—the provisions of the contract,—the nature and extent of the business carried on,—the mode of management,—the final winding up, and the ultimate loss and bankruptcy of the concern; and after setting forth that some of the bonds have been assigned to Messrs. Bell and Cuninghame, though paid from the funds belonging to the respondents, and that the greater portion of the remainder consists of advances made by them on behalf of the company, it concluded, that the appellants should be "decerned and ordained, by decree foresaid, to "make payment to the pursuers, conformable to the "amount of their advances respectively, of the rateable "proportions, corresponding to the respective shares of "stock held by the said defenders, of the sum of "15,000*l.*, or of such other sum as shall be ascertained; "in the course of the process to follow hereon, to "be the amount of the advances by the pursuers respec- "tively, on behalf of the said company, towards "extinction of its debts and obligations, according as "the rateable proportions thereof, falling on the "defenders, shall be ascertained in the course of

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" the said process, together with the legal interest of " said proportions from the respective dates of advance, " and in time coming, during the not-payment: " Further, the said defenders ought and should be " severally decerned and ordained, by decree foresaid, " to make payment to the pursuers of the rateable " proportions effeiring to the defenders, according to " their said respective shares of stock, of the sum " of 20,000*l.*, or of such other sum as shall be ascer- " tained, in the course of the process to follow hereon, " to be the amount of the outstanding debts and " obligations still due by the said company, as well as " of any further claims that may yet emerge, and of all " costs and expenses which may hereafter be incurred " in finally winding up the said concern, as the same " shall be severally ascertained in the course of the " said process, in order that the pursuers may operate " their relief from the said debts, obligations, and " expenses, by applying the said rateable proportions " thereof due by the defenders, along with their own " proportion, in extinction of the same."

There were also conclusions for having it found that the appellants, in the event of any of their number becoming insolvent, should be liable rateably for any deficiency thereby occasioned; and there were also additional subsidiary conclusions with reference to the ultimate winding up of the concern.

In defence it was pleaded, 1st, that the liability of each partner was limited to the amount of the share subscribed for; 2d, that the debts concluded for were contracted by means of loans and obligations entered into in violation of the contract, particularly the eighth article, and on the personal responsibility of the respon-

dents individually; 3d, that the claim of the respondents was barred, in respect that they proceeded to carry on the business after they knew that the capital was not half filled up, without communicating that fact to the partners; and 4th, that it was barred, in respect that the whole losses had arisen from their own violation of the contract, their concealment and misrepresentation, and from their gross negligence and misconduct in the management of the company's affairs.

A record having been prepared, parties were heard before Lord Jeffrey, as Ordinary, who (6th December 1836) pronounced the following interlocutor:—"The "Lord Ordinary having heard the counsel for the parties "very fully, on the closed record and whole process, "and made avizandum, repels the defence founded on "the clause (or clauses) in the contract of copartner- "ship, alleged by the defenders to import an absolute "limitation of the liabilities of the partners inter se to "the amount of the sums severally subscribed by them "for and as their shares in the said copartnership; "repels also the defence founded on the allegation "that the pursuers or directors of the said company "had no right to begin business, and no power to bind "the partners for any debts or obligations on behalf of "the said company, till the whole capital of 50,000*l.* "had been subscribed for and secured; and farther, "repels the defence founded on the clause or pro- "visions of the contract by which the defenders allege "that the powers of the directors to borrow money on "the responsibility of the company and the partners "thereof were restrained; and, before farther answer, "appoints the cause to be enrolled, that parties may

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" explain in what way the cases of the several de-
" fenders are or may be affected by this deliveranc-
" what findings or decernitures may be required
" apply it to their several cases, and what farth-
" determinations may be necessary to exhaust
" cause as to the said several defenders, or any
" them."

To this interlocutor his Lordship added the su-joined note, explanatory of the grounds of h- opinion.[1]

[1] " The first of the above-mentioned defences appeared to be that chie-
" relied on. It was rested mainly on the provision in the close of t-
" first article of the contract, ' that the partners should be bound
" relieve each other of the debts and engagements of the company on-
" to the extent of and in proportion to their respective shares therei-
" and partly upon passages in the 8th, 9th, and 13th articles, which w-
" said to confirm the construction put by the defenders on this first pr-
" vision. According to that construction, this provision was speci-
" intended to protect the body of partners from the consequences
" overtrading, or rash and imprudent dealings, on the part of th-
" directors, and was equivalent to an injunction that they should at- n-
" time put more than the subscribed capital at hazard, under pai- o-
" being made personally answerable, and without relief, for the co-
" quences of any more extensive speculations. Now, if any thing be
" clear in this case, the Lord Ordinary takes it to be, that this limita-ion
" of the provision to the case of directors having occasion for relie- is
" totally inadmissible. It is in express terms a provision limiting the
" right of relief of all the partners, as against each other. The ca- of
" directors is not once named or alluded to in any part of the arti-le;
" and it is not less, but more, extravagant to say that it applies ex-clu-
" sively to them, than it would be to say that they alone were exempted
" from its operations. If it had really been intended to impose such a
" restriction upon the powers of the directors to bind the company, it is
" inconceivable that the parties should have introduced it into this first
" article, which merely sets forth the universal and common-law rights
" and liabilities of the partners, instead of bringing it in as a limitation
" of the great general powers given to those directors by article 8, which
" does contain a special limitation as to borrowing, or as a qualification
" of the great immunities conferred on them by article 21.
" If the true meaning and effect of the restraining words now cited be
" therefore as the defenders contend, it necessarily follows that no one
" partner of the company who has been obliged by a creditor to pay any
" of its debts or engagements, or who is distressed by such a creditor,

Against this interlocutor a reclaiming note was presented to the Second Division of the Court, and on

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" will be entitled to any relief from the other partners, beyond the " amount which may remain unpaid upon the subscribed capital of each, " and if all have paid up their whole subscriptions he will be entitled to " no relief at all. Now the first question is, whether it is conceivable " that so monstrous and unjust a provision could be intended, or could by " possibility be admitted to have effect? The Lord Ordinary has never been " able to get over this, and thinks that any construction of which the " words are at all susceptible must be preferred to one which would lead " to such a consequence.

" The defenders, indeed, endeavour to show that the consequences " would all fall back upon the directors; and that if it was right that " they should not trade beyond their capital, except at their own peril, " there would be no harm in denying, even to an innocent partner, who " might be subjected in the consequences of their so overtrading, all " relief as against the other innocent partners, seeing, they said, that he " might still have relief against the rash directors themselves; but this is " evidently altogether fallacious. Take, first, the most favourable case for " the defenders; assume, contrary to the fact, that the directors would do " wrong in trading beyond the capital, and suppose that a private partner, " having no concern with the management, is obliged to pay a debt so " contracted, is there any justice or common sense in saying that he shall " not be relieved by the other partners, who were equally liable to such " distress? or, under the words relied on, would be enabled to claim " relief from the directors who overtraded? Those directors are not liable " for each other. The individuals who subjected the concern to the debt " may be all insolvent, and the whole subscribed capital may have been long " ago paid up. Then the directors are all necessarily partners; and it is " not easy to see how they should not have the benefit of the provision " in question as well as the others. There is confessedly no provision, " nor any thing like a provision, in the contract, that the individual " directors who overtrade shall be bound to relieve the partners who may " be consequently distressed by the company creditors; and what the " defenders seem to go on, in this attempt to escape from the result of " their construction, is really nothing more than some vague notion of " equity, and an assumed common-law liability of the directors, to an " award of damages and reparation as the penalty of their so overtrading. " In any ordinary case, however, there would plainly be no such liability; " and in the cases most likely to occur there would be no shadow even of " equity in seeking to subject them to such a penalty. There is, in point " of fact, it must always be remembered, no declaration in the contract " that no engagement shall ever be entered into beyond the subscribed " capital. Now, suppose the whole of that capital paid up, and yielding " great profits, under an admirable system of management, and that the " directors, in order to increase those profits, contract for 100 more cows.

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advising it the following interlocutor was (2d June 1837) pronounced :—" The Lords having considered this

" and a corresponding range of new cow-houses, could it ever be said that " this was a malversation, for which, in the event of any ultimate miscar- " riage, they could be made liable at common law in their own persons, " and without relief from their partners? And if there would plainly be " no such liability at common law, how is it possible to construe or spell " it out of a provision in the contract which makes no distinction between " directors and other partners; and instead of imposing any extraordinary " liability on its members, consists wholly in a declaration (as the de- " fenders at least allege) that they shall all be freed from the common " and natural liability of partners.

" But the radical fallacy of the defenders attempt to palliate the revolt- " ing consequences of their doctrine is that it is not true, in point of fact, " that engagements which cannot be answered by the subscribed capital " of the company must necessarily have been contracted by overtrading " on the part of the directors; and that it is, on the contrary, undeniable, " that cases must continually occur in which the natural right of " partners to be rateably relieved of company debts by each other would " be most unjustly cut off by that interpretation, while there was not the " least pretext for recurring on the directors, or any one else, for repara- " tion. Suppose the whole capital paid up and yielding a large profit, " and the directors resolved, notwithstanding, to incur no new expense " beyond the amount of the said capital actually in their hands. Suppose " that the final call on the partners had recently yielded 10,000*l.*, and " that this sum was deposited in a bank, and that on the faith of this " they had contracted for 2,000*l.* worth of cows, and 5,000*l.* worth of " new buildings, these undoubtedly would be engagements within their " powers, and the line of their duty, even according to the rigid and " imaginary restriction of the defenders. But suppose the bank to fail, " the cows to die of distemper, the houses to be destroyed by fire, and " the whole concern to be broken up before the prices of these articles " were paid, and then suppose that the sellers and contractors should sue " an individual partner for those company debts, and obtain decree " against him, could it be seriously maintained that he should have no " relief whatever against his partners, but be obliged to pay 7,000*l.* of " company debts out of his own pocket, from the mere accident of his " having been selected by a company creditor in preference to all or any " of those who were equally liable to their diligence? Yet, if the de- " fenders' reading of the provision in question is the right one, this would " be the inevitable consequence. The partners are only to relieve each " other to the extent of their subscribed capital still unpaid; but in the " supposed case it is all paid, and the debts having been contracted when " there was abundant capital in the hands of the directors to answer them, " even the shallow pretext of handing him over to them for indemnity " would be excluded. It is needless, indeed, to go to such an extreme

"note with the other proceedings, and heard counsel "thereon, adhere to the interlocutor complained of,

"case as has now been supposed, for the purpose of testing the doctrine "of the defenders, since, unless it be held that no company is to contract "any debts or engagements after its subscribed capital is paid up, how-"ever ample the stock in which that capital has been invested may be to "answer them at the time, it is obvious that unavoidable misfortunes "may reduce the creditors to the necessity of coming on individual "partners for satisfaction, and that the most unheard-of injustice must "be done, if they were to be excluded from all claim of relief on their "associates.

"The Lord Ordinary is satisfied, therefore, that this cannot be the "meaning and effect of the provision relied on by the defenders; and the "next question therefore is, what then is its meaning, and how are the "words of it to be satisfied? These words, no doubt are awkward and "ill assorted, but to him he will confess that they seem of very little "importance; the whole passage from the word 'declaring,' in the first "line of the page, to the end of the article, being, in his opinion, little "more than an idle amplification of the elementary principle of all co-"partnerships, and which would be implied, though not once mentioned "in the contract, viz., that the partners should share profit and loss "according to their interest in the concern, the words, 'but only to the "'extent of and in proportion to their shares therein,' being merely a "clumsy and tautological way of expressing a proportional liability, and "which, with a slight variance, might have been more clearly worded "as follows:—'but each only to an extent proportional to his share in "the stock of the said company.'

"But though the Lord Ordinary inclines strongly to think this, and "no more, the true meaning of the words in question, he conceives that "the peculiar form of expression may be explained by one or two suppo-"sitions equally inconsistent with the views of the defenders, and either "of them far preferable to their interpretation. The clause, it will be "observed, sets out with declaring generally, and without qualification, "that the partners 'shall have right to the profits, and be liable to the "'losses, arising upon the said business;' and it is only after having "made this separate and absolute provision that it proceeds to say, "'and shall be bound to relieve each other of the debts and engagements "'of the company, but only to the extent of and in proportion to their "'shares.' Now, the Lord Ordinary would suggest, that the debts and "engagements of the company, thus contradistinguished from its losses, "may have been meant of such debts and engagements only as might "be satisfied without loss to the company, as being within the amount "of the unpaid-up shares of the several partners; and that the limitation "meant no more than this, that when any individual partner was "distressed for debts of this description, he was to be entitled to pro-"portional and total relief from the rest, but to the extent only of those

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and make advances on their personal security. Annual general meetings were held in 1827, 1828, and 1829, at which the partners present (consisting always of the quorum required by the deed of copartnery) approved of reports on the state of the affairs.

At a general meeting in 1830 it was resolved to wind up the affairs of the company. It appeared from the reports on the affairs of the company, prepared by a juridical accountant, that "a total loss has arisen on the "concern, as at 31st May 1834, of 36,685*l.* 19*s.* 2½*d.*, "and after deduction of the amount of calls on the "partners received and applied (extending to 15,068*l.* "2*s.* 10¾*d.*), there remains a deficiency beyond the "recovered capital, and the estimated property and "funds of the company, of 21,617*l.* 16*s.* 3½*d.*;" that almost the whole of the above-mentioned loss had arisen from the fall in value of the heritable properties and buildings below their original cost, joined to the loss of interest on the prices, and the expense of titles and securities arising out of the purchase of those properties. The directors, or those in whose right they now stand, had made large advances from their own private funds, for the purpose of liquidating the debts and obligations of the company. The total amount of the outstanding debts of the company, in so far as the same had been ascertained, including the advances made by the directors, and advances by certain others of the partners, for the company's behoof, and in extinction of its obligations, was then 24,504*l.* 10*s.* 3¾*d.*

The defenders (appellants) who, besides the respondents, were the remaining solvent partners of the copartnery, having refused to contribute, with a view to make up this deficiency, an action was raised again-

Appellants.—1. The action was ill-founded, because in a question inter socios the appellants could only be

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one or two slight verbal changes, and the remarkable omission of the words 'but only to the extent of,' on which the whole case of the defenders depends. From the words 'bind and oblige,' in the fourth line of this second article, to 'shares of the capital stock,' in the ninth line, the whole is a literal transcript of the passage in the first article, including the obligation of relief, of which so much has been said, and the material thing is, that this obligation of relief is expressed in the second edition, without any limitation, except that of being proportional to the interest in the stock. It now runs thus,—'and shall be bound to relieve each other of all the debts and engagements of the company in the proportion of their respective interests or shares in the capital stock.' What was the object of this anxious iteration of a very unnecessary clause the parties have been unable to explain, and the Lord Ordinary does not pretend to understand. But as it is undeniable, that all the other slight variances of expression in the six lines so repeated do not make the least change in the sense or substance of the provision, so the utter omission of the words on which the defenders exclusively rely, affords a strong and almost conclusive reason for holding that this also was a variance by which the sense was not thought to be affected, and that the clear and indisputable meaning of the last edition of the words must also have been that of the first. If it was not, there is a palpable contradiction in these two consecutive clauses; and a contradiction which cannot be extricated or reconciled. By the one clause, the partners are bound to relieve each other only to the extent of and in proportion to their subscribed capital unpaid, and by the other they are bound to relieve each other in proportion to their interests in that subscribed capital. As to the meaning of the last there can be no doubt, and that meaning is entirely conformable to justice and common law. The former is in some measure ambiguous, and admits, as has been seen, of various interpretations; and, according to the defenders construction, it is utterly repugnant to justice, and without example in practice. If it admitted of no other construction but this, one of the contradictory provisions must give way, and the Lord Ordinary conceives that it cannot be that which stands last in the deed, and is alone conformable to equity and general law. If it does admit of construction, however, there can be no better guide to the true meaning than the immediate subsequent clause, in which the whole matter is resumed, with direct reference to the specific capital, which had not been previously defined.

"If this leading defence is not maintainable on the first article of the contract taken by itself, it is plainly in vain to hope that it may be aided by any of the rest. The special restriction upon borrowing in the close of the eighth article will be noticed in reference to the

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made liable to the extent of the shares for which they originally subscribed, in respect of the express stipulations to that effect in the written contract.

" last defence. But as to any bearing it may be supposed to have
" the first, it is enough to observe,—1st, that it relates expressly to
" directors, and not to partners generally; and 2d, that it would ob-
" ously have been unnecessary if the first article had imported what
" defenders now allege.

" The ninth article again plainly relates exclusively to calls on
" partners for the instalments of their subscribed capital, and to noth
" else. It regulates in great detail the forms of such calls, and the
" sequent proviso that the directors shall have no power thus to call
" any sum beyond that subscribed, manifestly relates to such calls o
" and not to actions of relief by partners distressed for company debts
" seeking to equalize the burden of its losses, after its business is at
" end. The proviso was probably unnecessary; but it was appare
" suggested by the loose wording of an earlier part of the same article
" which the directors are empowered to make their calls 'at such ti
" 'and to such amount as they shall think proper.' In fact, it is
" cisely equivalent to a parenthesis like this after the word amount, '(
" 'never exceeding the sum subscribed by each such partner,)' w
" would have been a better way of expressing what might very well
" been left to implication, and would obviously have afforded no
" for the strained inference of the defenders.

" The only other article referred to in relation to this first defence
" the 19th, and when fully considered, it appears to make strongly ag
" the views of the defenders. It relates to the right of a partner al
" to retire, or to sell his shares, to be relieved of all antecedent debts, &c
" of the company. It first provides, that 'he shall be entitled to re
" 'of the whole of such debts,' and then the other partners 'bind
" 'oblige themselves severally to relieve him in proportion to their shares,
" 'and to the extent of their liability herein-before expressed.' Now, at
" the very most, this merely falls back on the original definition or mea-
" sure of liability, and tends in no way to limit or define it. But look-
" ing to the clear and unqualified right of the retiring partner to be at
" all events relieved of the whole debts and obligations, and considering
" that on the defender's view of this original liability, he could have no
" relief at all, in the very probable case of the whole subscribed capital
" being paid up, when the creditors came to him for payment, it seems
" obvious that this liability could not be so limited as they allege, with-
" out imputing to this provision the most manifest inconsistency, as well
" as the grossest injustice.

" With regard to the defence rested on the allegation that the directors
" had no right to begin business, or undertake engagements for the com-
" pany, till the whole capital of 50,000*l.* was subscribed, it is not

dents individually; 3d, that the claim of the respondents was barred, in respect that they proceeded to carry on the business after they knew that the capital was not half filled up, without communicating that fact to the partners; and 4th, that it was barred, in respect that the whole losses had arisen from their own violation of the contract, their concealment and misrepresentation, and from their gross negligence and misconduct in the management of the company's affairs.

A record having been prepared, parties were heard before Lord Jeffrey, as Ordinary, who (6th December 1836) pronounced the following interlocutor:—"The "Lord Ordinary having heard the counsel for the parties "very fully, on the closed record and whole process, "and made avizandum, repels the defence founded on "the clause (or clauses) in the contract of copartner- "ship, alleged by the defenders to import an absolute "limitation of the liabilities of the partners inter se to "the amount of the sums severally subscribed by them "for and as their shares in the said copartnership; "repels also the defence founded on the allegation "that the pursuers or directors of the said company "had no right to begin business, and no power to bind "the partners for any debts or obligations on behalf of "the said company, till the whole capital of 50,000*l.* "had been subscribed for and secured; and farther, "repels the defence founded on the clause or pro- "visions of the contract by which the defenders allege "that the powers of the directors to borrow money on "the responsibility of the company and the partners "thereof were restrained; and, before farther answer, "appoints the cause to be enrolled, that parties may

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" fenders are or may be affected by this deliverance,
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" apply it to their several cases, and what farther
" determinations may be necessary to exhaust the
" cause as to the said several defenders, or any of
" them."

To this interlocutor his Lordship added the subjoined note, explanatory of the grounds of his opinion.[1]

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[1] " The first of the above-mentioned defences appeared to be that chiefly
" relied on. It was rested mainly on the provision in the close of the
" first article of the contract, ' that the partners should be bound to
" relieve each other of the debts and engagements of the company only
" to the extent of and in proportion to their respective shares therein,'
" and partly upon passages in the 8th, 9th, and 13th articles, which were
" said to confirm the construction put by the defenders on this first pro-
" vision. According to that construction, this provision was specially
" intended to protect the body of partners from the consequences of
" overtrading, or rash and imprudent dealings, on the part of the
" directors, and was equivalent to an injunction that they should at no
" time put more than the subscribed capital at hazard, under pain of
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" If the true meaning and effect of the restraining words now cited
" therefore as the defenders contend, it necessarily follows that no
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" But the radical fallacy of the defenders attempt to palliate the re[illegible]
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" least pretext for recurring on the directors, or any one else, for repara-
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" and the directors resolved, notwithstanding, to incur no new expense
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" that the final call on the partners had recently yielded 10,000*l.*, and
" that this sum was deposited in a bank, and that on the faith of this
" they had contracted for 2,000*l.* worth of cows, and 5,000*l.* worth of
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" imaginary restriction of the defenders. But suppose the bank to fail,
" the cows to die of distemper, the houses to be destroyed by fire, and
" the whole concern to be broken up before the prices of these artic[illegible]
" were paid, and then suppose that the sellers and contractors should sue
" an individual partner for those company debts, and obtain decree
" against him, could it be seriously maintained that he should have no
" relief whatever against his partners, but be obliged to pay 7,000*l.* of
" company debts out of his own pocket, from the mere accident of his
" having been selected by a company creditor in preference to all or any
" of those who were equally liable to their diligence? Yet, if the de-
" fenders' reading of the provision in question is the right one, this would
" be the inevitable consequence. The partners are only to relieve each
" other to the extent of their subscribed capital still unpaid; but in the
" supposed case it is all paid, and the debts having been contracted when
" there was abundant capital in the hands of the directors to answer them,
" even the shallow pretext of handing him over to them for indemnity
" would be excluded. It is needless, indeed, to go to such an extreme

with the other proceedings, and heard counsel con, adhere to the interlocutor complained of,

as has now been supposed, for the purpose of testing the doctrine pe defenders, since, unless it be held that no company is to contract debts or engagements after its subscribed capital is paid up, how- ever ample the stock in which that capital has been invested may be to cover them at the time, it is obvious that unavoidable misfortunes may reduce the creditors to the necessity of coming on individual partners for satisfaction, and that the most unheard-of injustice must be done, if they were to be excluded from all claim of relief on their associates.

"The Lord Ordinary is satisfied, therefore, that this cannot be the "meaning and effect of the provision relied on by the defenders; and the "next question therefore is, what then is its meaning, and how are the "words of it to be satisfied? These words, no doubt are awkward and "ill assorted, but to him he will confess that they seem of very little "importance; the whole passage from the word 'declaring,' in the first "line of the page, to the end of the article, being, in his opinion, little "more than an idle amplification of the elementary principle of all co- "partnerships, and which would be implied, though not once mentioned "in the contract, viz., that the partners should share profit and loss "according to their interest in the concern, the words, 'but only to the "'extent of and in proportion to their shares therein,' being merely a "clumsy and tautological way of expressing a proportional liability, and "which, with a slight variance, might have been more clearly worded "as follows:—'but each only to an extent proportional to his share in "the stock of the said company.'

"But though the Lord Ordinary inclines strongly to think this, and "no more, the true meaning of the words in question, he conceives that "the peculiar form of expression may be explained by one or two suppo- "sitions equally inconsistent with the views of the defenders, and either "of them far preferable to their interpretation. The clause, it will be "observed, sets out with declaring generally, and without qualification, "that the partners 'shall have right to the profits, and be liable to the "'losses, arising upon the said business;' and it is only after having "made this separate and absolute provision that it proceeds to say, "'and shall be bound to relieve each other of the debts and engagements "'of the company, but only to the extent of and in proportion to their "'shares.' Now, the Lord Ordinary would suggest, that the debts and "engagements of the company, thus contradistinguished from its losses, "may have been meant of such debts and engagements only as might "be satisfied without loss to the company, as being within the amount "of the unpaid-up shares of the several partners; and that the limitation "meant no more than this, that when any individual partner was "distressed for debts of this description, he was to be entitled to pro- "portional and total relief from the rest, but to the extent only of those

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" refuse the desire of the note, and reserve all questions " of expenses."

Alexander and others appealed.

" unpaid shares, by means of which the matter might, in such a case, be " settled without any sacrifice of the funds actually in the hands of the " company, and vested in its business, and consequently without giving " occasion to any thing that could be entered as loss in the books of the " concern. When the debts and engagements, however, exceeded the " amount of unpaid shares, they necessarily fell upon the input or vested " stock (or its profits), and thus passed into the separate head of losses, " for which, by the preceding part of the clause, the whole partners are " made liable absolutely, and without any limitation.

" If this, however, be the just view of the provision, it is certain that " the pursuers are entitled to judgment, the whole sums for which they " now call on the defenders being either truly and literally losses, or " debts and engagements, which remain after all the subscribed stock " has been applied towards their liquidation.

" The second supposition (which is not inconsistent with the pre- " ceding), by which a just and reasonable meaning may be given to the " words in dispute, is, that they were intended not to cut off the " inherent right of a distressed partner to equal relief from the others, " but only to oblige him to seek it simultaneously and proportionally " from them all; to deprive him, in short, of the power competent to " an extraneous creditor of the company, of selecting one or a few " to bear the common burden, and to make it necessary at once to " convene the whole, and to come against each only to the extent of the " proportion indicated by the amount of his share in the concern. This, " it is conceived, was a proper and laudable object, and will fully explain " and satisfy the words of the provision in question.

" Understood in this sense, too, it has been carefully attended to by " the pursuers in framing their summons, the conclusions being directed " against the whole solvent partners of the company, and only for " their rateable and proportional shares of the sums demanded.

" If the case had admitted of no other solution the Lord Ordinary " would have adopted either of these constructions in preference to that " of the defenders, and indeed he is strongly inclined to the views " on which the last of them is founded; but he has already stated " that he considers both as unnecessary, and is satisfied on the whole " that the words so much relied on are mere surplusage, and mean " nothing more than what was already expressed, and would indeed have " been implied if the whole clause had been omitted. One main " reason for this opinion is derived from the tenor of that part of the " second head or article of the contract, in which the whole of the " passage already referred to in the first article is carefully repeated, with

Appellants.—1. The action was ill-founded, because in a question inter socios the appellants could only be

" one or two slight verbal changes, and the remarkable omission of the " words 'but only to the extent of,' on which the whole case of " the defenders depends. From the words 'bind and oblige,' in the " fourth line of this second article, to 'shares of the capital stock,' in " the ninth line, the whole is a literal transcript of the passage in the " first article, including the obligation of relief, of which so much has " been said, and the material thing is, that this obligation of relief is " expressed in the second edition, without any limitation, except that " of being proportional to the interest in the stock. It now runs " thus,—'and shall be bound to relieve each other of all the debts and " 'engagements of the company in the proportion of their respective " 'interests or shares in the capital stock.' What was the object of " this anxious iteration of a very unnecessary clause the parties have " been unable to explain, and the Lord Ordinary does not pretend to " understand. But as it is undeniable, that all the other slight vari- " ances of expression in the six lines so repeated do not make the " least change in the sense or substance of the provision, so the utter " omission of the words on which the defenders exclusively rely, affords " a strong and almost conclusive reason for holding that this also was a " variance by which the sense was not thought to be affected, and that " the clear and indisputable meaning of the last edition of the words " must also have been that of the first. If it was not, there is a " palpable contradiction in these two consecutive clauses; and a contra- " diction which cannot be extricated or reconciled. By the one clause, " the partners are bound to relieve each other only to the extent of and " in proportion to their subscribed capital unpaid, and by the other they " are bound to relieve each other in proportion to their interests in that " subscribed capital. As to the meaning of the last there can be no " doubt, and that meaning is entirely conformable to justice and com- " mon law. The former is in some measure ambiguous, and admits, as " has been seen, of various interpretations; and, according to the de- " fenders construction, it is utterly repugnant to justice, and without " example in practice. If it admitted of no other construction but this, " one of the contradictory provisions must give way, and the Lord " Ordinary conceives that it cannot be that which stands last in the " deed, and is alone conformable to equity and general law. If it does " admit of construction, however, there can be no better guide to the " true meaning than the immediate subsequent clause, in which the " whole matter is resumed, with direct reference to the specific capital, " which had not been previously defined.

" If this leading defence is not maintainable on the first article of the " contract taken by itself, it is plainly in vain to hope that it may be " aided by any of the rest. The special restriction upon borrowing in " the close of the eighth article will be noticed in reference to the

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made liable to the extent of the shares for which they originally subscribed, in respect of the express stipulations to that effect in the written contract.

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" last defence. But as to any bearing it may be supposed to have on " the first, it is enough to observe,—1st, that it relates expressly to the " directors, and not to partners generally; and 2d, that it would obvi- " ously have been unnecessary if the first article had imported what the " defenders now allege.

" The ninth article again plainly relates exclusively to calls on the " partners for the instalments of their subscribed capital, and to nothing " else. It regulates in great detail the forms of such calls, and the sub- " sequent proviso that the directors shall have no power thus to call for " any sum beyond that subscribed, manifestly relates to such calls only, " and not to actions of relief by partners distressed for company debts, or " seeking to equalize the burden of its losses, after its business is at an " end. The proviso was probably unnecessary; but it was apparently " suggested by the loose wording of an earlier part of the same article, in " which the directors are empowered to make their calls ' at such times " ' and to such amount as they shall think proper.' In fact, it is pre- " cisely equivalent to a parenthesis like this after the word amount, ' (but " ' never exceeding the sum subscribed by each such partner,)' which " would have been a better way of expressing what might very well have " been left to implication, and would obviously have afforded no room " for the strained inference of the defenders.

" The only other article referred to in relation to this first defence was " the 13th, and when fully considered, it appears to make strongly against " the views of the defenders. It relates to the right of a partner allowed " to retire, or to sell his shares, to be relieved of all antecedent debts, &c. " of the company. It first provides, that 'he shall be entitled to relief " ' of the whole of such debts,' and then the other partners 'bind and " ' oblige themselves severally to relieve him in proportion to their shares " ' and to the extent of their liability herein-before expressed.' Now, at " the very most, this merely falls back on the original definition or mea- " sure of liability, and tends in no way to limit or define it. But look- " ing to the clear and unqualified right of the retiring partner to be at " all events relieved of the whole debts and obligations, and considering " that on the defender's view of this original liability, he could have no " relief at all, in the very probable case of the whole subscribed capital " being paid up, when the creditors came to him for payment, it seems " obvious that this liability could not be so limited as they allege, with- " out imputing to this provision the most manifest inconsistency, as well " as the grossest injustice.

" With regard to the defence rested on the allegation that the directors " had no right to begin business, or undertake engagements for the com- " pany, till the whole capital of 50,000*l.* was subscribed, it is not

The contract was framed on the basis that the partners were not to be liable under any circumstances

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" necessary to consider, whether there might not be cases where such a " ground of pleading might be admitted. It is enough, that it is clearly " excluded by the circumstances of the present. In the first place, the " contract, though only begun to be signed in April 1825, expressly pro- " vides, that the copartnership shall be held to have commenced in " January preceding, and refers to and recognizes in various places (and " particularly in articles 5 and 8), the proceedings of various meetings of " directors in February and March preceding. In particular it declares " (article 5), that the directors appointed by a meeting of the 2d February " shall be continued in office for two full years, so as that no interruption " should be given to the operations in which they were engaged. To " the Lord Ordinary it appears that no party signing this contract can be " allowed to pretend ignorance of what had been done or sanctioned at " these previous meetings. But the matter is not left to implication, for, " in the 8th article of the contract, deliberately subscribed by the defen- " ders, the directors are in express terms empowered ' to complete and " ' carry into effect the purchases made of the lands of Wheatfield and " ' Meadowbank, and to take measures for the erection of suitable " ' accommodation for the establishment, and to enter into all contracts " ' and deeds necessary,' &c. Now, the lands of Wheatfield had been " already bought for a price of 12,000*l.*, and the lands of Meadowbank " for 9,750*l.*; and yet the defenders, who all sign before any thing like " the amount of these sums was subscribed, do instruct the directors, " on their responsibility, to carry into effect those purchases, and " to grant all necessary deeds for that purpose. It is quite in vain to " say that partners who thus expressly recognized and adopted as acts " of the company purchases made four months before, and when there " was not one farthing of actual subscription, must be held (upon " mere implication) to have meant that nothing further should be done " till 50,000*l.* had been actually collected; and that when they directed " buildings to be erected on the lands so purchased they had no notion " of authorizing any contract being entered into for that purpose till " this whole capital was secured. If they declared it right and laudable " to lay out 20,000*l.* when they had no capital at all, it is extravagant " to say that they would have reprobated the idea of contracting for " necessary buildings to the extent of 9,000*l.*, when they had a sub- " scribed capital of only 20,150*l.* The directors accordingly entered " immediately into such a contract, and the buildings were actually in " progress before most of the defenders subscribed. The Lord Ordi- " nary cannot think it doubtful that they were fully warranted in so " doing, by the express terms of the contract already in part recited. " But in this way the company was bound, by the express authority of " the defenders and the other subscribers, and before a single subscrip- " tion was realized, to the extent of more than 30,000*l.*, which was

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beyond the amount of the capital stock subscribed f[illegible]t by them respectively. Whether reference be had [illegible]o

" the true origin of the debts still owing, and in fact, with the ot[illegible]her " unavoidable expenses of the experiment thus authorized, the source[illegible] of " the whole losses which have been sustained.

" This alone might dispose of the defence, that the directors ha[illegible] no " right to expose the partners to hazard, or to bind them in any obliga[illegible]ion " till the whole capital was subscribed. But there is another provisio[illegible]n in " the contract which is separately conclusive upon this head. This is[illegible] the " latter part of the second article, which expressly declares, that it ' [illegible]hall " ' be in the power of the directors to retain, for behoof of the com[illegible]ny, " ' such number of shares as they may think proper of the said ca[illegible]ital " ' stock, to be disposed of by them in such way as they may think[illegible]best " ' for the company.' Now, under this provision, it is plain tha[illegible] the " directors might have retained, and for as long as they thought fit, [illegible]any " proportion of the 2,000 shares into which the 50,000*l.* of prop[illegible]ed " capital was to be divided; and it would be palpably absurd to say, [illegible]hat " they were not to begin business so long as any part of these w[illegible]re so " retained. How, then, can it be pretended that, under this contr[illegible]ct, " they were not entitled to begin business till the whole 2,000 shares [illegible]ere " appropriated? And what practical difference would it have made, if " they had, by an express minute, declared the 1,300 shares which [illegible]were " actually undisposed of, had been retained in terms of this provision, for " behoof of the concern? In point of substance and effect they were so " retained, and as completely at the disposal of the company and its " managers as if a minute to this effect had been formally engrossed in " the books. That it was not so engrossed may be an impeachment of " their book-keeping or accuracy in entering their transactions, but [illegible]n " never deprive them of the substantial power, under which they ha[illegible]e " really acted, or subject them to forfeitures as for breach of an imagin[illegible]y " interdict against entering on business till all the shares are actual[illegible]y " taken by individual partners, in the very face of this express licence a[illegible]d " permission to the contrary.

" The last defence disposed of by the preceding interlocutor, is th[illegible]t " founded on the concluding part of the 8th article of the contract, b[illegible] " which the directors are empowered to borrow ' on the credit and sec[illegible] " ' rity of the company,' to the extent of 3,000*l.*, provided there is sub[illegible] " scribed capital unpaid up to that amount at the time. This, thoug[illegible] " properly an empowering clause, is contended to import a prohibition t[illegible] " borrow, except on those conditions, and this prohibition, the defende[illegible] " say, the directors have violated, by borrowing to a much larger extent[illegible] " and when there was no such unpaid capital; and they maintain the[illegible] " cannot be called on to relieve them of the consequence of such borrow[illegible] " ings.

" Now, the short answer to this is, that there have been no borrowing[illegible] " ' on the credit and security of the company,' to a greater extent than i[illegible] " permitted by the contract; that the greater part of the transaction[illegible]

the provision which expressly declares, that their liability shall be limited "to the extent of and in pro-

"complained of under that name consisted merely in granting new "securities for debts previously existing, and recognized in the contract "itself, and the remainder in raising money on the personal credit of "individual partners or directors, and afterwards advancing it to pay off "the most pressing of the existing debts of the company. According to "the Lord Ordinary's impression, there is no one case in which money "has been raised, directly or indirectly, on the company's account, in "order to extend its business (the case evidently contemplated in the pro-"vision referred to), or for any other purpose than to satisfy the claims "to which the company was liable from the very beginning, or which "ought to have been defrayed by the withheld instalments on the sub-"scribed capital. It is needless to go here into the details of those pro-"ceedings; but with the exception of the sums actually advanced for "those purposes out of the private funds of individual directors, the Lord "Ordinary is not of opinion that any farther investigation is necessary. "With regard to these, a question may no doubt be raised, whether the "condition of the company was not such as to have made it the duty of "the directors rather to have allowed the creditors, whom they thus "pacified with their own money, to have proceeded with diligence against "its property, than to have delayed an inevitable catastrophe by such "interference. If the defenders can make out any case of gross and "pernicious imprudence of this kind, it will be open to them to do so "under the preceding interlocutor, which merely finds that these were "not acts of borrowing on the credit and security of the company, in "contravention of the contract. To him it certainly occurs, that it would "be next to impossible to make out such a case. By paying the most "urgent debts of the company with their own money, they may have "done no real service to the concern. But they would seem entitled, at "all events, to come in the place of the stranger creditors, whose pro-"ceedings they thus arrested, and against whose claims it is admitted that "the defenders would have had no protection.

"In these circumstances, it is needless to inquire into the justness of "the legal assumption, that the grant of a limited power in a contract of "this description implies such a penal prohibition against exceeding the "limit, as in every case to infer the forfeiture of equitable rights, other-"wise competent at common law, to persons in the situation of the "pursuers; and it is equally unnecessary to consider the effect of the "declaration, which immediately precedes this implied prohibition, viz. "'that the powers of the directors shall, in all particulars, be subject to "'such limitations, extensions, and alterations as a general meeting shall "'think fit,' taken in connexion with the fact, that the whole proceedings "of the directors, with their books and documents, were submitted to "several general meetings, subsequent to the public conclusion of all the "transactions now complained of, and deliberately sanctioned by a general "vote of approbation."

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" portion to" the shares subscribed for, or to those other clauses which no less unequivocally declare, that " in no event" shall calls be made upon the partners for sums beyond their subscribed capital, or which expressly debar the directors from borrowing money beyond the amount of subscribed capital, it appears very plain that it was the meaning of all the subscribers to the contract, that their liability should be of this limited description. It might be very true, indeed, that a restricted liability of this nature could not be secured to the partners by means of the contract in any question with the public. A total immunity from loss could only be obtained by charter or act of parliament. But it may be observed in passing, that the directors were authorized by the 37th section of the contract, " to apply for a royal " charter of incorporation or for an act of parliament " in favour of the company at any period they shall " think proper." Hence, it appears that it had been contemplated by all parties that application should be made for a charter of incorporation, by which the plan of a limited responsibility might have been carried more fully into effect.

The first clause contained the important qualification as to this limitation of liability. It expresssly declares, that the partners " shall have right to the profits and " be liable for the losses arising from or upon the said " business, and shall be bound to relieve each other " of all the debts and engagements of the company, " but that only to the extent of and in proportion to " their respective shares therein." This qualification is set forth as a substantive provision in the very outset of the contract. It occurs in the very first clause. And it is quite clear that this is the operating clause.

It provides for the constitution of the partnership; the partners "bind and oblige themselves, their heirs, "executors, and representatives whomsoever," to contribute and pay the full amount of the shares respectively subscribed for; and the right to the profits, and the liability for loss is regulated by it.

The ninth clause also expressly bears, "and in no "event shall it be in the power of the directors to call "upon the partners for a sum beyond that subscribed "for by them respectively." These words not only proceed on the notion of, but expressly provide for a restricted liability. The directors were empowered to direct the shares subscribed for to be paid by instalments. So long as any portion of these instalments was not paid they had a certain security for any engagements which they might undertake. But in so far as related to indemnification from the partners their claim ceased with the amount of the shares. Whatever engagements they might enter into beyond this sum they could not look to the partners for indemnity. The partners were entitled to stand on the stipulation, "that "in no event shall it be in the power of the directors "to call upon them for any sum beyond that subscribed "for by them respectively." If it had been the intention of the partners to undertake a general liability for each other, for all the obligations of the company, whether they exceeded the amount of the subscribed capital or otherwise, this clause would never have been introduced into the contract. It indicated, as plainly as words could do, that if the directors, by overtrading or mismanagement, exceeded the amount of capital, all obligations beyond it must be

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held to have been undertaken on their own personal responsibility, and not on the responsibility of the partners.

The other clauses in the contract aided the same construction, in which there is nothing unreasonable, as it only imports a salutary limitation of the common law liabilities, which it was expedient in this instance to restrain.

2. As the greater portion of the debt concluded for in the present summons was contracted by means of advances made by the individual directors, or of obligations entered into by them on their personal responsibility, and ultimately paid by them out of their own funds, the appellants were not bound to relieve the respondents of any such advances or obligations.

This proposition had been met in the note of the Lord Ordinary by the inconclusive remarks, that there had been truly no borrowings, "that the greater part "of the transactions complained of under that name "consisted merely in granting new securities for debts "previously existing, and recognized in the contract "itself, and the remainder in raising money on the "personal credit of individual partners or directors, "and afterwards advancing it to pay off the most "pressing of the existing debts of the company." All this, however, proceeds on a very obvious fallacy, in point of argument, and on a mistake in regard to the fact. The Lord Ordinary manifestly assumes, that the raising of money fell within the ordinary powers of administration of the directors, and that, provided they could raise it, without borrowing it, in the strict sense

of that word, their actings would be binding on the whole partners. It has been already shown, however, that this is a very erroneous view of the matter. According to the whole conception of the contract it was the manifest understanding of all parties that the administration of the directors was not to extend beyond the capital subscribed for, and that no debt was to be contracted beyond that capital. The raising of money beyond that sum implied an excess of power, whatever might be the form in which the transaction was carried through. The point to be looked to is not whether actual loans were made beyond the sum of 3,000*l.*, but whether the credit and security of the company could be pledged to a greater extent. It was not the form of the transaction but the substance of it which must be regarded. Hence it followed, that in so far as the respondents have endeavoured to pledge the credit and security of the company beyond the capital actually subscribed for, the appellants are freed from all liability. Generally, if one partner draws a bill for a partnership debt, it becomes a debt by the copartnery, but not so in a company like this.

3. The appellants were not liable for the sums concluded for in this action, in respect that the respondents, contrary to the fair meaning of the contract, proceeded in the business of the partnership before the contract was subscribed for the whole stipulated capital, and that they afterwards persevered, when, in the knowledge that it was not then subscribed to the extent of one half of this capital, concealing from their copartners the important alteration which had occurred in the defalcation of the capital.

The appellants knew nothing of the relative number

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of subscribers who had subscribed, and refused to subscribe the contract. It was the province of the directors exclusively to look to this; but when a change of so vital a character had occurred they were not entitled to proceed in the business without obtaining fresh instructions from the whole partners referably to the altered situation of the affairs of the company. That it was the deficiency of the capital which led to the action could not be disputed. Had the whole capital of 50,000*l.* been subscribed the present question could not have been raised. The loss would have been distributed over an increased number of partners, and would have been less than the number of shares for which they had respectively subscribed. But further, it was the commencement of the business with an inadequate capital which has caused much of the loss. It was this which led to the whole system of borrowing, and caused to be included, as constituting part of the loss of the company, a sum of no less than 8,107*l.* 16*s.* 6*d.* for interest on loans and debts; and by deranging the whole system of management from the beginning, diminished even the chance of success which the concern might have had under more favourable circumstances. It was impossible to doubt that the alteration that had taken place between February, when the respondents reported that the whole capital had been subscribed, and April thereafter, when they knew that not more than about 20,000*l.* was to be looked to, was material; and could it be disputed that the managing partners of a concern are bound to communicate all material facts to their copartners? The meeting of February authorized purchases to the amount of upwards of 20,000*l.*, believing that the capital was 50,000*l.*; but, if they had been

told that it was not to be the half of that sum they most assuredly would have altered their course. They would either have closed the concern, which might have been done at a small loss, or have reduced the scale of the establishment.

The Lord Ordinary notices the appellants "pretending ignorance" of what had been done. His Lordship says, that if they thought it right to lay out 20,000*l.* "when they had no capital at all," it is extravagant to say that they would have reprobated buildings at a cost of 9,000*l.*, "when they had a subscribed capital of only 20,150*l.*" But this is absolute perversion of the fact. In place of having no capital at all, when they authorized an outlay of 20,000*l.*, they believed, upon the written report of the respondents, that they had a capital of 50,000*l.*

Independently of the interlocutors being erroneous on their merits there would be manifest injustice in repelling these defences, which extend so deeply into the merits of the action, before the appellants have had an opportunity of bringing forward their whole case upon the alleged acts of mismanagement, which they were confident would work their exemption from the present claim. No judgment ought therefore to be pronounced which would conclude them, by a decision in one branch of the cause.

Respondents.—1. The respondents, as directors and partners, or in right of directors and partners, of the Caledonian Dairy Company, were by law liable only rateably, according to the respective shares held by them of its stock, for the losses sustained and debts and obligations incurred by that company; and they were

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entitled to be relieved of all farther proportions of said losses, debts, and obligations by the remaining solvent partners rateably, according to the interest which such partners respectively had in the concern.

In the first place, what each of the appellants was called upon to contribute towards the relief of the respondents was a sum proportioned to his own share of the stock. Had these claims been made by creditors who were not partners of the company the solvent partners would have been liable, conjunctly and severally, and each partner might have been sued in solidum. But as this is an accounting inter socios, the claim is framed upon a different footing, each of the appellants being sued only for his rateable proportion of the sums of which the respondents are entitled to be relieved.

In the next place, this was not an action for payment of calls to contribute to the stock of the company. The company has been dissolved, and the object of the action is merely to adjust and allocate among the different partners, according to their respective interests in the concern, the losses which have been incurred, and the debts which remain unpaid.

The appellants, accordingly, had not disputed that the respondents have a legal right to such relief as is thus claimed by them, unless that right is excluded by the conditions of the contract of copartnery; but it they said that that contract contains stipulations which exempts them from their legal obligation so to contribute towards the relief of their copartners. The Court of Session had found that pretence to be altogether untenable, on the grounds so unanswerably stated in the note of the Lord Ordinary.

2. The contract of copartnery contained no condition importing a limitation of the liabilities of the partners, inter se, to the amount of the sums severally subscribed by them for and as their shares in the copartnership; but, on the contrary, it imposed upon them an express obligation to relieve each other rateably, according to their respective interests in the concern.

In no part of the first clause is the amount of the sums subscribed by the partners said to be the measure of their liability. From beginning to end of that clause the amount of the sums subscribed by them not only is not referred to for that purpose, but is never once mentioned for any purpose whatever. What the contract refers to as the measure of the liability of partners inter se, is just the equitable one established by the law of Scotland itself, viz. "proportions "corresponding to their respective shares" in the company; and, in the next place, even had there been any doubt otherwise as to the meaning of the rule thus stated for regulating the liability of partners inter se, certain it is, that at all events it could not mean that the sums subscribed by the respective partners should be the limit of their liability. That meaning at all events must be excluded; for, it will be observed, that the right of the partners to profits, as well as their liability for losses, and for relief of debts, was to be measured by the same rule. The words "only to the extent of, and in proportion to, their "respective shares therein," apply to the one as well as to the other. The amount of the subscribed capital of each partner, therefore, cannot be the rule which is here prescribed for measuring the extent of his right

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Respondents Argument.

to the profits; and neither can it be the rule wh is here prescribed for measuring the extent of his bility for losses and debts, because that liability to be regulated by precisely the same rule as the righ profits. Whatever therefore may be the meaning of rule thus prescribed for regulating the liability of p ners in relief to each other, it cannot have that mean which the appellants wish to engraft upon the words

The appellants were not entitled to resist the cl of the respondents on the pretence that the direc of the company had not power to bind the partn for debts and obligations on its behalf till the w capital of 50,000*l.* has been subscribed for and secur and they were not freed from their legal obligation rateable relief to the respondents by the clause in contract relating to the borrowing of money.

These positions were amply supported by the rea ing of the Lord Ordinary, and the opinion of the C as expressed by Lord Medwyn.[1] And there could no danger to the ultimate and satisfactory adjustmen the rights of the parties in the further progress of action by affirming these interlocutors, as every th else was clearly reserved by the Lord Ordinary in posing of three of the defences founded on.

The LORD CHANCELLOR, throughout the hearing the cause, intimated his concurrence in the views of Lord Ordinary upon the merits of the defences, moved that the consideration of the cause be adjourn that their lordships might consider of the propriet point of practice of affirming these declaratory findi at that stage of the proceedings.

[1] Report in Fac. Coll.

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Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, in the appeal which was before your lordships yesterday, in consequence of what was pressed by the learned counsel for the appellants in his reply, I was desirous to take an opportunity of examining the proceedings, in order to satisfy myself, and to be able to state to your lordships, whether there really was any danger, such as seemed to be anticipated by the learned counsel, namely, that by affirming the interlocutor of the Court of Session your lordships might be giving more effect to that decision than appears to have been intended by the learned judges who pronounced it. I find that the appellant himself, in stating his case, on the fourth page, states the grounds of his defence in these terms:—"The action was re-"sisted on the ground, 1, that the liability of each "partner was limited to the amount of the shares "subscribed for; 2, that the debts concluded for "were contracted by means of loans and obligations "entered into in violation of the contract, and on "the personal responsibility of the respondents indi-"vidually; 3, that the claim of the respondents was "barred in respect that they proceeded to carry on "the business after they knew that the capital was not "half filled up, without communicating that fact to "the partners; and, 4, that it was barred in respect "that the whole of the losses had arisen from their "own violation of the contract, their concealment and "misrepresentation, and from their gross negligence "and misconduct in the management of the company's "affairs." Now, the interlocutor of the Lord Ordinary, affirmed by the Inner House, disposes of three of these grounds in the very same terms in which they are put forward by the defenders themselves. It repels

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"the defence founded on the clause or clauses in the
"contract of copartnership, alleged by the defende
"to import an absolute limitation of the liabilities
"the partners inter se, to the amount of the sum
"severally subscribed by them for and as their shar
"in the said copartnership." It repels also "the
"defence founded on the allegation, that the pursue
"or directors of the said company had no right t
"begin business, and no power to bind the partner
"for any debts or obligations on behalf of the said
"company, till the whole capital of 50,000*l.* had bee
"subscribed for and secured;" and further repels "the
"defence founded on the clause or provisions of the
"contract, by which the defenders allege that the
"powers of the directors to borrow money on the
"responsibility of the company and the partner
"thereof were restrained; and before further answe
"appoints the clause to be enrolled, that parties ma
"explain in what way the cases of the several defen
"ders are or may be affected by this deliverance
"what findings or decernitures may be required t
"apply to their several cases, and what further deter
"minations may be necessary to exhaust the cause a
"to the said several defenders, or any of them."
Therefore, my Lords, according to a very usual course of proceeding in the Court of Session, it disposes of parts of the case, lays down the general principles by which the future proceedings are to be regulated, but it does not exhaust the case, but reserves the consideration of other matters, merely declaring certain points to be adjudged as the foundation of what the Court may hereafter think it right to do.

My Lords, it is consistent with the practice of the

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Court of Session, much more than it is consistent with the practice of any court in this country, so to deal with the case. In a late case of great importance[1] your Lordships had an instance, where the summons containing declaratory and petitory conclusions, the court confined itself to the declaratory conclusions, leaving the petitory conclusions for further consideration. It declared the right, but it did not administer the relief, but left the question of what relief was to be administered for the further consideration of the court. So in this case the court says that the points set up in behalf of the defenders are not capable of being maintained, and it is not inconsistent with the practice of the Court of Session to repel those defences, but if the court think that there are other points which require further inquiry and further consideration, it does not exhaust the subject, but merely declares that in so far as the defence rests upon certain points the court is of opinion that the defence cannot be maintained. My Lords, the court has in this instance done no more than that. It has taken up the defences brought forward by the parties themselves, and it has adjudged that those defences do not meet the case made by the pursuers. It leaves the rest of the subject entirely untouched; and therefore I do not see the least danger to be apprehended from its being supposed that the interlocutor which has been pronouced can have any more effect than that which your Lordships yesterday were of opinion ought in substance to be pronounced, namely, that the defence relied on in these three grounds which constitute the substance of the interlocutor, are not defences which can protect the case of the defenders. Any other defence is open to them; it only declares

[1] Auchterarder Case, see antea, p. 220.

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7th Mar. 1839.

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that these three grounds are not positions upon which the defence can stand.

Now, my Lords, that being very plain upon the interlocutor,—such being the understanding of the Lord Ordinary, and the clear opinion of the judges of the Second Division of the Court, and I may say the clear opinion of your Lordships upon the discussion of the merits of the case, in the way almost conceded by the learned counsel for the appellants, for no resistance could be made to the conclusion to which the Court of Session had come, the difficulty, if any, was supposed to arise upon this point of form. If your Lordships are of opinion, as I certainly am, that the point of form is not open to the observations which have been made upon it, your Lordships cannot hesitate, upon a matter which appears upon investigation to be extremely plain, to affirm the interlocutor of the Court below, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

RICHARDSON & CONNELL—ARCHIBALD GRAHAME, Solicitors.

[*3d June* 1839.]

(Appeal from the Court of Session, Scotland.)

ALEXANDER CAMPBELL, Appellant.[1]— *Attorney General (Sir John Campbell)* — *Bagley.* (No 11.)

DUNCAN CAMPBELL, Respondent. — *Dr. Lushington.*

Appeal — Practice — Stat. 55 *Geo.* 3. *c.* 42. *s.* 4. 6. *&* 8. — *Stat.* 59 *Geo.* 3. *c.* 35. *s.* 16.—The partners of a distillery were convicted in penalties, which were levied from the appellant and respondent respectively: the appellant sued the respondent for his share of certain cash advances made by him for behoof of the company; the respondent brought an action against the partners for indemnity from the said penalties, on the ground of nonparticipation in the offence: the appellant, among other defences to such action, pleaded, that, the partners having been all involved in the same delict, there was no ground for contribution or indemnity by one against the other. The judgment of the Lord Ordinary or of the Court was not taken on that defence; and the Lord Ordinary sent the cause for trial by a jury. The judge at the trial gave no direction as to said defence, and no exception was tendered: and a verdict was returned for the respondent. The Court, upon motion with notice by appellant for a rule to show cause why the verdict should not be set aside and a new trial granted, refused to grant a rule to show cause why the verdict should not be set aside; thereafter the Court applied the verdict, and decerned for the sum found due, with costs, which were also subsequently decerned for: Held, that an appeal against such judgment, applying the verdict and decerning, was competent.

IN 1820 the appellant and the respondent, and two individuals of the name of Macandrew, became partners

2D DIVISION.

Lord Ordinary Fullerton.

[1] 12 S. D. & B., 573. 870. 923.

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3d June 1839.

Statement.

of the Easdale Distillery Company. This company carried on business from February 1820 till August 1822, and was dissolved in December thereafter.

In consequence of alleged misconduct by those in charge of the operative department of the concern, illicit spirits had been mixed up with the produce of the distillery, and a prosecution for penalties to the amount of 10,500*l.* was instituted at the suit of the Crown in the Scotch Court of Exchequer, where the practice of the English Courts prevails.

The defendants (the present appellant, the respondent, and the Macandrews,) put in a joint plea of not guilty, and tendered evidence at the trial in Exchequer, which took place on the 17th of December 1823, and ended in a verdict of conviction against all of them, and in a judgment for the full amount of penalties. The defendants thereafter got the penalties modified to 3,000*l.* A writ of extent was issued, and their several proportions of the above mitigated penalties were levied from the appellant and respondent respectively.

In 1824 the appellant, who had made considerable advances in purchasing grain and other materials for the company's use, to the extent of upwards of 1,500*l.*, raised an action in the Court of Session against the respondent, concluding for payment of 559*l.* 1*s.* 10*d.*, being his share of this debt of 1,500*l.*, and for any deficiency that might arise from the insolvency of the other partners.

In 1827 the respondent instituted an action in the Court of Session against the appellant and the two Macandrews, and one Hunter, a servant in the establishment, averring his own ignorance, and their knowledge, of the illicit practices carried on at the distillery,

and concluding for a total indemnity, at the hands of the appellant and of the other defenders, of the whole modified penalties in which they had been condemned. To this action the appellant pleaded in defence,— 1. that the action was irrelevant; that the respondent being involved in the same delict with the appellant, by the verdict and judgment following thereon, could not legally sue to have the whole consequences of that delict thrown on the appellant, and himself relieved of them; and that no action lay at his instance against the appellant. 2. He denied, in point of fact, that he ever knew, or was in the slightest degree accessory to, the improper practices alluded to.

Upon this state of the pleadings, the Lord Ordinary gave no judgment upon the objection to the relevancy of the action; but the cause being a proper one for trial by jury his Lordship remitted the case to the jury roll, and the parties went to trial on the following issues as settled by the Lord Ordinary:—

"It being admitted that the pursuer and defenders, "Alexander Campbell and Donald Macandrew, and the "late John Macandrew, were partners of a com- "pany for the purpose of distilling spirits at Easdale, "and that the defender, Robert Hunter, was brewer "or distiller to the said company; and that on the "17th day of December 1823 the said company were "found liable in a penalty of 3,000*l.*, as being guilty "of contravening the revenue laws:—

"Whether the defenders, or any of them, were guilty "of the said contravention of the said laws, whereby "the said company were subjected in the said penalty, "and obliged to pay certain expenses? And whether "the defenders, or any of them, are indebted and rest-

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" ing owing to the pursuer in the sum of 1,171*l.* 5*s.* 1*d.*
" or any part thereof, with interest thereon, as the
" balance of the said penalty and expenses? Or whe-
" ther the said contravention of the said laws was with
" the knowledge of the pursuer?"

The Judge who presided at the trial left the case to the jury, upon the evidence.

The jury returned a verdict in the following terms:—
" At Edinburgh, the 22d, 24th, and 25th days of March
" 1834. Before the Right Honourable David Boyle,
" Lord President of the Second Division of the Court
" of Session, compeared the said pursuer and the said
" defenders by their respective counsel and agents, and
" a jury having been impannelled and sworn to try the
" said issues between the said parties, say upon their
" oath, that in respect of the matters proven before
" them, they find for the pursuer on both issues; and
" that the defenders are indebted and resting owing
" to the pursuer in the sum of 1,059*l.* 5*s.* 1*d.*, with
" interest, as libelled."

The appellant gave " notice of a motion for a rule to
" show cause why the verdict should not be set aside, and
" a new trial granted."

In discussing the motion " to set aside the verdict," the appellant insisted on his preliminary defence, and on the judgment and verdict in Exchequer, produced in evidence on the trial, as sufficient to quash the verdict as contrary to evidence; but he was met with the objection in point of form, that in hoc statu, on a motion arising out of the trial, the Court could only judge of the law so far as it applied to the direction given at the trial, and that no direction was given or required at the trial, nor exception taken upon this preliminary matter; and

Statement.

that the ground on which the motion was made resolved into a plea which should have been taken at the trial, and stated by way of exception, and not by a motion for a new trial; and that as the verdict must stand, a motion for a new trial was incompetent. The Court thereupon made the following order (1st July 1834):—"The Lords refuse to grant a rule "to show cause why the verdict in this case should not "be set aside."

Thereafter the verdict, and the Judges report of what had passed at the trial, were laid before the Court of Session; and the respondent gave the following notice of motion to enter up judgment:—"Take notice, that "on the 4th current, Duncan Campbell esq., the pur- "suer, will move the Honourable Court to apply the "verdict of the jury in this case, to decern in terms "thereof, and to find the defenders liable in the ex- "penses incurred by the pursuer, and to remit the "account thereof to the auditor to tax and to report. "Dated at Edinburgh this 2d day of July 1834." The appellant opposed this motion, but the Court ordered the whole cause to the roll, when their Lordships pronounced the following judgment:—"In respect of the "verdict found by the jury on the issues in this cause, "the Lords decern against the defenders, conjunctly "and severally, for payment to the pursuer of the sum "of 1,059*l.* 5*s.* 1*d.*, with interest as libelled; find the "defenders liable to the pursuer in the expenses in- "curred by him in this action; appoint an account "thereof to be lodged, and remit to the auditor to tax "the same, and to report."

Judgment of Court, 4th July 1834.

Thereafter their Lordships pronounced the following interlocutor:—"The Lords allow the decree pro-

Judgment of Court, 11th July 1834.

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"nounced in this case for the principal sum of "1,059*l.* 5*s.* 1*d.*, and interest thereon as libelled, to be "extracted ad interim."

Statement.

Against these several interlocutors Alexander Campbell appealed.

The respondent having objected to the competency of this appeal before the appeal committee, their Lordships reported to the House that, on account of its importance in practice, the question of competency should be argued at the bar of the House by one counsel of a side; and on the 12th August 1834, the cause having been called on, the competency of the appeal (which then embraced the previous interlocutor of the Court on a motion for a new trial) was discussed.

Appellant's Argument.

Appellant.—The pleas on the merits which bore materially on the competency were shortly these:—1st, The action by the respondent is incompetent, in respect that he himself, as well as his copartners, being by the verdict in Exchequer found guilty of the offences charged, and condemned by the Court in the statutory penalties, no action can lie at the suit of either against his associates for relief or indemnity of these penalties; and no one of the co-partners can be permitted to recover in an action founding on the above-mentioned verdict and judgment, and at the same time asserting his own innocence of the charge of which, by these very proceedings, he stands legally convicted; and, 2d, he had urged the Lord Ordinary to dispose of the preliminary defences before trial, at every step of the cause.

Some smuggled spirits had been received upon the premises of this company, and certain violations

of the excise laws were committed by the company, in respect of which His Majesty's Advocate commenced a criminal prosecution for penalties, to the amount of 10,000*l.*, in the Scotch Court of Exchequer. Instead of resisting this prosecution, it was resolved to effect an arrangement with a view to mitigation of penalties. By a practice which occurs in Scotland, and which was also of frequent occurrence in England, the verdict in Exchequer was taken by consent, against all the parties, for penalties afterwards restricted to 3,000*l.* The present respondent, Duncan Campbell, was afterwards advised to raise an action, in the Court of Session, against his copartners, concluding to be relieved from the consequences of the verdict in Exchequer. Now, no such thing was known in the law of England, nor in the law of any other country, as an action for contribution among wrongdoers. That had been clearly settled in the well known case of Merewether and Nixon[1], and also in the more recent case of Colburn and Patmore[2] in the Court of Exchequer. [LORD CHANCELLOR BROUGHAM stated, that it appeared to his Lordship that this was an action brought at the instance of one accomplice against his co-associates in crime. Such a thing was perfectly wild.] Such is precisely the case here; nevertheless, it would appear that a different view of this matter had been taken by the Court of Session, for instead of giving the defenders the benefit of the pleas which they had taken, an issue was prepared and ordered to be tried by a jury. Now the defenders had no alternative but to go to trial upon this issue, for the act of the 55 Geo. 3. c. 42. s. 4. enacts, "that it shall

[1] 4 Term. Rep. 180.
[2] 1 Cro. Mee. & Ros. 72; S. C. 4 Tyrw. 677.

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Appellant's Argument.

" not be competent, either by reclaiming petition or " appeal to the House of Lords, to question any inter- " locutor granting or refusing such trial by jury." [LORD BROUGHAM, C.:—Is the plea set forth in the record?] The conviction in Exchequer was set forth on the record, and formed the subject of substantive pleas in law. [LORD BROUGHAM, C.:—Did you take a defence upon the conviction in Exchequer? I want to see the summons and defences.] There was no doubt of the fact that the plea in question had been brought out distinctly and broadly on the record in the Court below. In this state of matters, being, as their Lordships would perceive from the section of the act to which they were referred, compelled to go to trial, the case came before a jury, and a verdict was returned in favour of the pursuer (respondent). The defender (appellant) thereafter moved the Court to have the verdict set aside, in respect of the conviction in Exchequer. A motion was made in arrest of judgment. The Court below refused the rule, and they afterwards pronounced judgment, proceeding upon the verdict, ordaining the defenders to pay the pursuer the amount prayed for in the summons, viz. 1,059*l.* 5*s.* 1*d.*, with interest and costs. Against this latter judgment the present appeal was entered. The respondent has presented his petition, praying that the appeal may be dismissed as incompetent. The appeal is said to be incompetent under the act 55 Geo. 3. c. 42. ss. 6. and 8., and also by the 59 Geo. 3. c. 35. s. 16. Now the argument of the appellant was, that by interlocutors appealed from no point of law is decided; the interlocutor of the 1st of July being merely a refusal to set aside the verdict, and the interlocutors of 4th and 11th July being merely to apply and give effect to the verdict

[LORD BROUGHAM, C.:—Had you a demurrer in the Court below upon the plea?] My Lord, I am not aware that they have in Scotland any form of plea in the nature of a demurrer. [LORD BROUGHAM, C.:—Was the plea made a preliminary defence? I am anxious to have a copy of the defence; and the better way perhaps is to allow this action to stand over until I shall have had an opportunity of perusing the summons and defence.]

LORD BROUGHAM, C., addressing Dr. Lushington:—Pray is this not a motion for an arrest of judgment, non obstante veredicto. There can be no objection to that; it is matter of familiar practice. But at any rate, do you mean to say that there is any clause in these statutes which shuts out the party from an appeal to this House? You cannot cut off the right of appeal by implication. The right of appeal does not stand upon any act of parliament. There is no act of parliament giving a right of appeal. That right is the constitutional privilege of all the King's subjects.

DR. LUSHINGTON:—My argument is, that trial by jury in Scotland being entirely a matter of statutory introduction and regulation, there is no appeal, except where the statutes allow it.

Here the Lord Chancellor rose, and stated that he had now no difficulty whatever in recommending to their Lordships to sustain the competency of this appeal. Let the respondent's petition, therefore, be dismissed. Ordered accordingly.

On the following day (13th Aug. 1834) the cause was again brought under the notice of their Lordships by the respondent's counsel, ex parte, who stated, that since the matter was last before the House there had been furnished a copy of the notice of motion for a rule to show cause.

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3d June 1839.

Appellant's Argument.

LORD BROUGHAM, C.:—I am not certain th cannot be an appeal from the judgment, beca have entered up judgment.

The appeal subsequently dropped from the c by default of the appellant in lodging prints of but he having afterwards presented a new appe ing from the former in so far as he did not appe the order refusing the rule to show cause, respondent petitioned against this second appea ground of incompetency; and the matter havi referred to the Appeal Committee, their Lord ported that the point should be argued, by one of a side, at their Lordships bar; which argu cordingly took place in session 1837.

The cause having stood over, was this day (1839) called on.

Ld. Chancellor's Speech.

LORD CHANCELLOR:—My Lords, this is a ca was heard at your Lordships bar some time a which had, in fact, escaped my recollection. T was for the purpose of recovering a contributi one of several partners, towards the paymen amount of a verdict which had been found at of the Crown against all the partners for a b the excise laws. The jury having found in favo pursuer, an application was made to the Court sion for a new trial, which was refused; upon w judgment of the Court was pronounced in these t

" In respect of the verdict found by the jury on th
" in this cause, the Lords decern against the de
" conjointly and severally, for payment to the
" of the sum of 1,059*l.* 5*s.* 1*d.*, with interest as li

An appeal was presented to your Lordship against that decree of the Court of Session, and

the order refusing a new trial; that took place in the year 1834. That appeal was met by a petition for dismissal upon the ground of incompetency; and to the extent of the order of the Court of Session refusing a new trial, there can be no doubt the appeal was incompetent, inasmuch as the act[1] prohibits parties from coming to this House, upon orders of the Court below upon applications for new trials. The present petition of appeal was then presented, which left out the order refusing a new trial, and appealed against the order I have just read, and another order of subsequent date consequential upon it.'

The question now is, whether that can be dealt with as an incompetent appeal, being against the final interlocutor of the Court of Session. The order is for the payment of the money. There is nothing, undoubtedly, in the act which prohibits such an appeal. Your Lordships will not fail to observe under what difficult circumstances the appellant comes here. His real and substantial defence is this; that the penalties under the excise laws being, by the verdict of a jury, on behalf of the Crown, found against all the partners, that one partner cannot recover, in a civil action against the others, a contribution for that which is a liability incurred by a wrong.

There was a plea on record, which set forth, to a certain extent, what was sufficient to raise the matter in issue coupled with something else. There was a plea raising that defence, but upon that plea no judgment of the Court was asked before it was sent to a jury; and the issues referring the matter to a jury were in these words:—"It being admitted that the pursuer

[1] 55 Geo. 3. c. 42. sec. 4.

CAMPBELL v. CAMPBELL. 3d June 1839. Ld. Chancellor's Speech.

" and defenders were partners of a company for th
" purpose of distilling spirits, and that the defend
" Robert Hunter, was brewer or distiller to the sa
" company; and that, on the 17th of December 182
" the said company were found liable in a penalty
" 3,000*l.*, as being guilty of contravening the reven
" laws; whether the defenders, or any of them, w
" guilty of the said contravention of the said la
" whereby the said company were subjected in
" said penalty, and obliged to pay certain expen
" and whether the defenders, or any of them, are
" debted and resting owing to the pursuer in the s
" of 1,171*l.* 5*s.* 1*d.*, or any part thereof, with inte
" thereon, as the balance of the said penalty and
" penses? or whether the said contravention of the sa
" laws was with the knowledge of the pursuer?"

Now the jury found this verdict. They say, " Th
" in respect of the matters proven before them, th
" find for the pursuer on both issues, and that th
" defenders are indebted and resting owing to th
" pursuer in the sum of 1,059*l.* 5*s.* 1*d.*, with interest
" libelled." Now that finding involves a question
law as well as a question of fact, because, if there w
an illegality in the original transaction which preven
one party recovering a contribution against the oth
the defenders could not be indebted and resting owi
to the pursuer. It was a point of law, therefo
arising at the trial, which must either have been a
sumed or decided before the jury could come to th
conclusions.

Now it is said that the Learned Judge who presi
at the trial did not explain to the jury what the
was. If he had been applied to at the trial to d

he would undoubtedly have given an opinion to the jury, as to whether the pursuer could recover with reference to that question. But it does not appear that any such application was made[1]; so that neither in the first instance upon the interlocutor directing the issue, nor in the second instance when the issue was at trial, did the defender take the course which was clearly open to him, of asking the opinion of the Court, or the opinion of the Judge, as to the illegalityof the transaction being an answer to the demand against him.

Under these circumstances the finding of the jury is one that cannot now be disturbed, inasmuch as an application was made to the Court of Session for a new trial, and the Court of Session refused a new trial, and against that interlocutor refusing a new trial no appeal can be presented to your Lordships house. The present appeal is against the interlocutor giving effect to the verdict of the jury; that is to say, the jury having found that the defenders are indebted and resting owing to the pursuer in a certain sum. The interlocutor decreed that payment should be made. It is for the appellant to consider how far, in prosecuting this appeal, he is likely to succeed. But that is not now the question before your Lordships for decision. The question for your Lordships decision now is, whether this appeal be incompetent. I find that it is an appeal against a final order of the Court of Session for payment, and I do not find any thing in the statute which raises any doubt as to its being competent to a party to come here for the purpose of asking your Lordships whether that interlocutor can be supported or not.

[1] See 12 S., D., & B., 573.

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3d June 1839.

Ld. Chancellor's Speech.

Now the ground of the appeal is, that the verdict does not exhaust the whole merits of the question. Whether it does or does not exhaust the whole merits of the question is a matter about which your Lordships may be very well able to form your opinion on looking at the pleadings, but it is not a matter before your Lordships for decision. The question is, as to whether the appellant shall be sent away from your Lordships bar upon the ground of having brought an appeal which it is incompetent to him to bring. It appears to me that there is no incompetency; whatever may be the result of the appeal itself is matter for the consideration of the appellant; but I think that the petition, praying that the appeal may be dismissed as incompetent, must be refused.

Die Lunæ, 3° *Junii* 1839.

Respondent's petition to dismiss appeal as incompetent considered, and dismissed; and the appeal sustained.

W. S. GRUBBE—A. H. MACDOUGALL, Solicitors.

[*3d June* 1839.]

(Appeal from the Court of Session, Scotland.)

Mrs. MARIA CAMPBELL STEWART[1], Appellant.— *Pemberton — Sir William Follett.* (No. 12.)

FERDINAND S. C. STEWART, and Attorney and Mandatory, Respondents. — *Dr. Lushington — James Russell.*

Agent and Client — Transaction.—Where a deed of agreement of compromise of their respective claims to the succession of a deceased relation had been settled and executed by three parties, one of whom afterwards brought an action of reduction of the agreement on the ground of lesion, through erroneous advice of her law agent, who was agent also of the two other parties, as to her legal rights, of which she was ignorant:—Held (affirming the decision of the Court of Session) that, upon the facts and written evidence of the transaction, the party had failed to establish relevant grounds for disturbing the agreement.

2D DIVISION.

Lord Ordinary Cockburn.

Statement.

FREDERICK CAMPBELL STEWART, a native of America, now deceased, succeeded in 1815 as heir of entail to the estates of Ascog and Whitebarony. Having been advised to sell the lands, Mr. Stewart instituted proceedings in the Court of Session to ascertain his powers under the entail; and the Court found, that although he was not effectually prohibited from selling the lands, he was bound, if he did sell, to rein-

[1] Rep. 15 D., B., & M., 112.

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vest the price in the purchase of other lan settled on the same series of heirs.[1] Mr. appealed to the House of Lords against the f to reinvesting the price of the lands; and fate of that appeal was still uncertain Mr. St 1826 and 1827, executed various deeds, pro the event either of a reversal or affirmance, in Mrs. Stewart his wife, of his two daughte brother Professor Ferdinand Stewart, and of Mrs. Anna Stewart. Mr. Stewart and his soon afterwards died in France. In 1830 the Lords, reversing the decision in the Ascog Caus that Mr. Stewart was under no obligation to re price in the purchase of other lands. Mr. the law agent in Edinburgh of Mr. Stewar and nearest of kin, entertaining doubts as respective rights, obtained the opinion of upon a memorial for the trust disponees of Mr

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[1] F. C., and 5 S. & D. 418. [2] 4 W. & S.

[3] "Opinion by Francis Jeffrey, Esq., and Andrew Ruth "upon Memorial and Queries for the Trust Dispone "rick Campbell Stewart, Esq., of Ascog.

"1, 2, 3, 4. In the event of its being decided in the Hou "reversing the judgment of the Court of Session, that the "by Mr. Campbell Stewart is not subject to reinvestment as "for the entailed estate, there can be no doubt that the pric "the other moveable funds vested in the memorialists, mus "have been the personal property of their constituent, and n "with accordingly.

"The domicile of Mr. Stewart is of importance chiefly, "us, as regulating the domicile of his daughters, who died "had obtained any domicile of their own independently of hi "question here is between the American and the Scotch d "we see no ground whatever upon which it can plausibly be "he obtained any domicile on the continent of Europe. T "the Scotch domicile, and of the Scotch law in virtue of it "the moveable succession of Mr. Stewart and his children "attended with a great deal of difficulty, principally becaus "that he had unquestionably an American domicile before

The parties having been advised by counsel to settle by compromise questions which appeared to be of a

"this country; that it is a rule very general, in reference to intestate "succession, though not, perhaps, without exception, that there can be "only one domicile, and that a domicile once established cannot be lost, "except by actual acquisition of another domicile; and that there is an "absence of any proper residence or abode in Scotland. At the same "time, there are many strong circumstances on the other side; and we "are certainly not prepared to say that this is a case in which the Scotch "law, which must be appealed to in the first instance, will feel itself to be "controlled by the American domicile, and constrained to surrender the "property within its jurisdiction to the distribution of a foreign law. "We may add, too, that considering the property as in bonis of the "children, the difficulty of the case appears to be somewhat increased, in "consequence of the father's deed vesting the funds in the hands of "Scotch trustees, and appointing them, at the same time, to be tutors "and curators to his children.

"With respect to Mr. Campbell Stewart himself, we are of opinion "that he must be held to have died testate, although, at the same time, "it is not quite free of question, whether, under the particular provisions "of this deed, the shares which are declared to be payable to the children "or survivors on majority or marriage, vested in the children by the mere "survivance of the father, or lapsed in consequence of their predecease "before marriage or majority; and on the supposition of their lapsing, "the whole funds must be held to be still in bonis of Mr. Campbell "Stewart, and to be distributable as his intestate succession, seeing the "trust deed makes no destination of his property, beyond his children "and their issue. If, however, as we rather hold, the shares vested in "each child upon survivance, then the funds must be distributed as the "intestate succession of the children; and we are inclined to think that, "in their case, there are some circumstances which strengthen the right "of those whose interest it is to claim under the Scotch law.

"We have chosen rather to state where we conceive the difficulties "to lie, than give any direct opinion upon the questions which suggest "themselves; because, before forming a satisfactory opinion, some farther "information may be necessary as to the facts; and because, in so far as "regards the memorialists, or any practical advice they may require, we "can have no doubt, in the first place, that the rights of the competing "parties must be determined in the Scotch courts, leaving each party to "make effectual his claim as he can, under the law on which he founds; "and, in the second place, that nothing but a judgment of the court will "effectually exonerate the trustees, except, indeed, a compromise between "all the parties, who, in any view of the case, can make a plausible claim "under either the American or the Scotch law. We think such a mode "of settlement would be very advisable in a case presenting so many "difficulties, and threatening a very tedious and expensive litigation; "but even if a compromise were gone into, it ought to be done judicially,

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difficult nature, a deed of agreement was entered in between Mrs. Stewart the widow, and Ferdinan Stewart and his sister Anna Stewart, which, aft setting forth the particulars as to the succession a the uncertainty of the rights of parties connect therewith, contained a stipulation that the three parti "with a view to avoid litigation, and being mutua "disposed to an amicable arrangement," consen and agreed that the free proceeds of the whole es and effects other than the entailed estate should divided equally among them.

Mrs. Stewart subsequently brought an actio reduction for the purpose of setting aside this ag

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"and the trustees, at all events, should bring an action of multi "poinding, in which the several parties interested may lodge claims, a "afterwards assent to judgment, in terms of any compromise they m "agree to.

"5. Assuming that the succession is distributable by the law of Sco "land, on which supposition it would have been vested, under the dee "or otherwise, in the child last deceasing, we are of opinion tha "Mr. Stewart, and his sister Mrs. Tennent, must succeed equally a "next of kin; that his act of naturalization gives him no exclusiv "right, and that she, as an alien, is not prevented from taking movable "succession.

"6. On the supposition of the law of Scotland regulating the succes "sion of Mr. Stewart and his children, in which view only this questio "is of importance, we are of opinion that the widow has no right whate "ever to any part of the funds, except in so far as she claims her share "of the goods in communion, or under Mr. Stewart's trust deed.

"7. In the event that the House of Lords shall affirm the judgme "of the Court of Session, and that the price must be reinvested, we are "of opinion that the bonds of provision executed under Lord Aberdee "Act, in favour of the daughters, must be considered as moveable, and "must, along with the residue of the trust funds, be distributable accord "ing to the law which shall be held to regulate the daughters movable "succession. These bonds are in no respect different from other per "sonal bonds, except in this, that they are effectual against the heirs o "entail, and that the rents of the entailed estate may be attached in "payment of them.

(Signed) "F. JEFFREY.

"Edinburgh, 3d April 1830. "AND. RUTHERFURD."

ment, and in support of her action pleaded:— 1. That the agreement had been brought about by undue concealment and misrepresentation of her rights, and her apparent consent obtained to a deed, the real meaning and import of which, as affecting her legal rights, she did not understand. 2. The agreement had been entered into when she and the other parties thereto were ignorant of the rights conferred upon her by the last will and testament of Mr. Stewart, and when they had in view only the deeds referred to and specified in the said agreement; she also pleaded that upon the said agreement being reduced she would be entitled, independently of the said will or testament, to claim as at the death of her husband, both by the law of Scotland and by the law of Virginia, which was that of his domicile, the full third share of all his personal estate and effects; and also to claim during her life, by the law of Scotland, the third part of the rents of any heritable property in Scotland in which her husband was infeft at the time of his death, as well as certain other benefits from which she had been excluded by the agreement.

It was pleaded in defence,—1. The grounds of reduction were not relevant, or sufficient in law to support the conclusions of the action. 2. The pursuer was not ignorant, but cognizant of her rights, and of the deeds by which the same were regulated, when she executed the agreement sought to be reduced. 3. That she had *homologated* the agreement and transaction.

After closing the record and hearing parties Lord *Cockburn*, Ordinary, pronounced the following interlocutor: — "The Lord Ordinary having considered "the closed record and productions, and heard parties,

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" both of whom have renounced farther probation, " finds, that the pursuer has not established any suffi- " cient ground for setting aside the agreement brought " under reduction; sustains this defence, assoilzies the " defender, and decerns: finds the pursuer liable in " expenses, appoints an account thereof to be given in, " and, when lodged, remits the same to the auditor to " tax and report.

" (Signed) H. COCKBURN."

" *Note.*—The pursuer wishes to reduce a contract " by which a portion of her deceased husband's property " was divided into three parts, of which she got one, " and his brother and sister two, on the ground that " she was thereby materially injured, and was led into " the bargain from ignorance of her legal rights.

" The fact of her being materially injured, if the " whole risks be taken into view, is not proved. The " subject of the arrangement was complicated and " difficult, as the consultations with counsel shew; and " the doubtful and expensive disputes which might " possibly have arisen, would have been among persons " closely united by relationship and friendship. Con- " tingencies had therefore to be considered, and peace " to be obtained by concession, as is declared in the " agreement, and transpires through all the corre- " spondence. If the possible consequences of litigation " and dissension are brought into the calculation, the " reality of her lesion is at the least doubtful.

" The exact nature and extent of her ignorance is " equally uncertain. That she did not know the whole " law of her case, or cases, is probably true; as it is of " most parties. But the certainty and the degree of " her ignorance is by no means clear. Her evidence

consists entirely of letters which passed between and her agent; but it is proved that she had onal interviews with him; and the points on h she now says that she was in the dark were on which it is very improbable that no commution then passed between them. Accordingly, herself acknowledges in several letters that she ys meant to make a sacrifice, and on grounds h shew that she knew more of her true legal ion than is now admitted. For example, one of principal averments on which this action rests is, in sharing the property with her brother and -in-law, she was not aware that the law of land gave her more than a third, or rather than -rent of the third. Yet in her important letter e 29th December 1831 to her sister-in-law, in h she explains what her inducements to enter the contract had been, she says, 'I was quite re that if I had recourse to a lawsuit the whole ld probably be mine.' There are other letters similar avowals.

t assuming both injury and ignorance; she was edly misled solely by her own professional er;—a gentleman against whose intelligence aracter nothing is said. It is alleged that he lso the agent of the opposite parties. But this nown to her, and it is not averred on the record he betrayed the one client to the other; nor is in any other respect the slightest fraud imputed m. He honestly thought it best for her that ould enter into this arrangement, and she took dvice. She wrote to him, saying she thought argain better for her brother and sister-in-law

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" than for her, 'but I submit all these matters to your
" 'better judgment.' (Letter, 26th April 1830).
" Eight months after this, she repeats the objection in
" very explicit terms. 'I do not think the chances
" 'equal.' (Letter, 2d December 1830.) Nevertheless, after another pause of above two months, and
" more explanation from her agent, she signs the contract, which sets forth various deeds, judicial proceedings, professional consultations, and 'conflicting
" 'opinions, by different eminent counsel at the
" 'Scottish bar,' and declares, that the compromise is
" gone into 'with a view to avoid litigation, and being
" 'mutually disposed to an amicable arrangement.'

" It was found in the case of M'Allister (26th June
" 1827), that the circumstance of a party losing a
" judgment by being kept in ignorance by his agent,
" formed no ground for disturbing the party who had
" obtained it. On the same principle, whatever claim
" the pursuer may have against her agent, it does not
" appear to the Lord Ordinary that the ignorance or
" inadvertence of the legal adviser, by whom she chose
" to be guided, can, in a case free from all fraud, be
" made to affect third parties, who are not said to have
" been accessory to her being misled.

" The Lord Ordinary has not decided upon homologation as a separate defence, because he conceives
" it to be superseded hoc statu, by the failure of the
" pursuer to establish her own case. But undoubtedly
" the acts from which homologation is inferred do
" throw a strong light on the real state of her mind
" and views, in reference to her own grounds of action.
" For they amount to this: that, at a period when it is
" nearly impossible to believe that she was in any

"ignorance of her rights, she deliberately enforced "what she held to be the meaning of this very con- "tract, and gained materially, at the expense of the "defender, by doing so. H. C."

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Mrs. Stewart reclaimed, but the Court (22 Nov. 1836) adhered, and of new found expenses due by the pursuer.

Judgment of Court, 22d Nov. 1836.

Mrs. Stewart appealed.

Appellant.—The real question at issue is, whether a deed or contract can be supported against a party who has subscribed it, though it should turn out that the party never truly consented to any such deed? In cases of fraud or deception, a deed is set aside solely because it is not the deed of the party, and because the apparent consent given by the act of subscription infers no true consent by the party so subscribing. And this principle, it will be found, applies as strongly to the present case as it can to any case where a deed has been executed under the influence of fraud or deception.

Appellant's Argument.

Upon the circumstances admitted or proved it was clear, that, by some unaccountable mistake, which has never been explained, the appellant, a stranger to the law of Scotland, was entirely misled and deceived as to her rights, even under that law. By the law of Scotland, a widow is entitled, on the death of her husband, leaving children, to claim, as her right, the third part of his personal estate, not the liferent of this third, as erroneously held out by Mr. Wardlaw, and also the terce, or third part of the rents, of any heritable property in which her husband has died infeft.

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Appellant's Argument.

It is not necessary to prove actual fraud, if it be an act which no person of sound mind, and not under delusion, could either have proposed or consented to under the agreement in question; she got nothing whatever for compromising her rights; the compromise gave her nothing to which she was not otherwise legally entitled. Relief is granted in such cases solely because the confidence of the party having been taken in by the fraud, her consent was never truly given to the transaction, notwithstanding any subscription, or other act, by which she might appear to have consented. In order to form a contract or transaction[1], there must, as the civilians define it, be "duorum pluriumve con- "sensus, in idem placitum;" that is to say, there must be a true and genuine consent to the contract or transaction. The appellant is far from maintaining that where the nature of the contract has been correctly explained, it is necessary that the parties should be fully aware of all its consequences, or even of all its legal effects. It is quite conceivable that two parties may enter into a transaction or agreement in utter ignorance of their rights, and upon this very footing; and in that case the transaction or agreement may be binding upon both, whatever knowledge they may afterwards come to acquire. But suppose the one party, while he affected ignorance of the facts, was perfectly aware how they stood, will it be maintained that the other party, upon discovering this, and ascertaining how much he had been imposed upon, would be bound by the agreement? The concealment in this case might be held equivalent to fraud; but, in truth, the only

[1] Dig. lib. 2. tit. 14.

legal ground for setting aside such an agreement is, that both parties did not stand upon an equal footing. The principle is the same, if, by any misrepresentation or concealment, the consent of the party is obtained to an agreement to which he would not otherwise have assented. In such cases, it is immaterial whether the misrepresentation has originated from fraud or from gross error. It is, in this sense, that the maxim of the civil law, "culpa lata dolo equiparatur," is to be understood.[1] It is the same in its consequences or effects. It equally takes in the confidence of the party who is imposed upon, and produces an apparent consent to an act to which no true consent is given.

It was not because the appellant did not foresee all the consequences and results of this agreement that she now sought to set it aside, but it was because it is altogether a different agreement from what it was represented to be; and an agreement of course to which she never gave her consent. She consented to enter into this agreement upon receiving what was represented to be at least the double of what she could have claimed by the law of Scotland, as the widow of her late husband, but it now appears that this was a gross misrepresentation, and that she gets less by the agreement than she was entitled to claim by the law of Scotland *in* her own right as the widow of Mr. Stewart.

The Court treated the agreement in question as a transaction which, however unfair or unreasonable, could not be opened up, entirely overlooking that it was a transaction to which the appellant had never truly given her consent. In England relief has been given

[1] Respecting the maxim "Culpa lata," &c. see Bell's Digest, voce Culpa Lata, and authorities there cited.

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Appellant's Argument.

in circumstances which seemed far less to require
Thus, in Gordon v. Gordon[1], it was held by Lord Eld
that a party was entitled to relief against an agreeme
" on the principle that, though family agreements
" to be supported where there is no fraud or mist
" on either side, or none to which the other part
" accessory, yet where there is mistake, though im
" cent, and the other party is accessory to it,
" Court will interpose." And in the case of Murra v. Palmer[2], Lord Redesdale set aside a " conveya
" obtained from a woman in ignorance of her righ
" and upon misrepresentation of the circumstances
" the property, although she was of full age,
" acquiesced in the sale, and received the interest
" the purchase money for twelve years, and althou
" she consulted with her friends and had their asse
" they being in equal ignorance with herself." It had been said, that in the present case there is
actual fraud alleged, however gross and inexcusab
the misrepresentation might be, under which the a
pellant was made to act. This perhaps might admit
doubt, if fraud, as Lord Hardwicke[4] has said, may
only " be actual, arising from facts and circumstan
" of imposition, which is the plainest case," but a
may be " apparent from the intrinsic nature and s
" ject of the bargain itself, such as no man in
" senses and not under delusion would make, on
" one hand, and as no honest and fair man wo
" accept on the other." Besides, upon the face of
agreement in question, and independently of all
written evidence by which the misrepresentation

[1] 3 Swanston, 400. [2] Ibid 467. [3] 2 Schoale and Lefroy, 474.
[4] Earl of Chesterfield v Janseen, 2 Vesey sen. 155.

concealment practised upon the appellant are established, the deed bears such plain and intrinsic proofs of imposition, as to shew that it could not have been entered into, except under the influence of delusion, or by a person not capable of understanding her rights.

Respondents Argument.

Respondents.—The averment of the appellant, that she entered into the agreement in question in ignorance of the fact now averred for setting it aside is not supported, but is, on the contrary, refuted by the evidence, while the error alleged to have been committed in point of law in arranging the terms of the agreement, is neither manifest, nor, although it were, is it a reason for disturbing the agreement, without evidence that it was caused by the fraud or fault of the respondent. Dixon[1] v. Monkland Canal Company, 17 Sept. 1831. The evidence in the cause establishes her knowledge of her husband's will.

If the contract or agreement be viewed as a "transaction," by which each gave up to the other part of what the law might have given them had they resorted to it, the appellant's grounds of reduction are still more untenable. The deed of agreement set forth the doubts and conflicting opinions entertained "by different eminent counsel at the Scottish bar"—that "a trial at "law of the very intricate questions arising thereon "must be attended with very great delay, expense, and "uncertainty. Therefore (it proceeds), and with a "view to avoid litigation, and being mutually disposedto an amicable arrangement, we, the parties "above named, the widow and next kin of the said

[1] 5 W. & S. App. 445.

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Respondents Argument.

estates, acted in direct hostility to the interests of the respondent; and that the respondent was, in truth, confiding in the appellant's agent as his adviser, when, on being invited to join in the agreement, as proposed by him, and as its terms were arranged by him, he consented to do so.

The case of Hope v. Dickson, (17th December 1833, 12 S., D., & B., 222.) founded on by the appellant, does not apply, as there were special circumstances which do not exist here.

There is evidence that the appellant, before concluding the agreement in question, was aware of all the facts now averred by her for setting it aside, and therefore there is no ground for questioning it, so far as depending on ignorance of fact; and in so far as it is attempted to disturb the agreement, on the ground of ignorantia juris, while it is by no means obvious that she ever had the rights which she says were unduly compromised by the agreement, it is submitted that the ground is insufficient, without evidence that the respondent misinformed her of her rights, or, by other unfair means, induced her to enter into the agreement, of which there is no evidence, or even an averment.

Ld. Chancellor's Speech.

LORD CHANCELLOR: — The object of this suit was to reduce and set aside a deed or agreement signed by the pursuer on the 12th February 1831 by which she and the defender, the brother, and Mrs. Tennent, the sister of the pursuer's late husband, entered into an arrangement as to various matters of dispute which had arisen between them respecting the property of the pursuer's late husband.

A new arrangement having been made between the suer and Mrs. Tennent, the present contest is only h Ferdinand, her late husband's brother.

The summons states three grounds for the relief yed; first, an objection in form, which has not been ed upon; secondly, that she was induced to sign agreement in ignorance of her rights, being misled the person who acted at the same time as her agent l as agent for the other parties; thirdly, that she was the time ignorant of the existence of a will executed the husband by which he gave to her all his per- al property, or at least that the effect of the will was erlooked by her, and that the deed or agreement oceeded upon the footing that no such will existed.

It is important to examine the facts recited in the ed in question, and then, by comparing them with e facts proved, to consider how far they were, by mis- epresentation or omission, inconsistent with the truth. The deed states the succession in 1815 of Frederick, he appellant's husband, to certain entailed estates in Scotland, and that it being uncertain whether he (then siding in and a native of the United States) or his ncle or the defender were entitled, they had agreed at the party in possession should pay to each of the hers one fourth of the income during his own life, d during such time as his widow might receive dower: at Frederick, who possessed the estates, had not paid y thing to the defender under their agreement: at Frederick, being advised that the entail was not fectual, instituted a suit in the Court of Session ainst the heirs of entail, and in 1827 obtained an terlocutor declaring that he might sell the estates, ut that he was bound to reinvest the purchase money: hat he appealed to the House of Lords, but died

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before the appeal was determined: that Frederick in 1824 sold part of the estates, and in 1827 the other part, and died on the 26th May 1827, and that an action had been brought by the purchaser of part of the estate to have his title confirmed or for repayment of the purchase money, which was still depending, and that it had been determined by the House of Lords that there was no obligation to reinvest the purchase money of the estates, and consequently that the price must be considered as falling under a certain trust deed of settlement before recited; namely, the deeds recited being first a mortis causâ deed by Frederick, securing under the powers of the entail 1,000*l.* to Mary, his only child by his first marriage; secondly, heritable bonds securing to the appellant 100*l.* per annum, but which are stated to have been renounced by her; thirdly, a bond of provision securing to his children with the former provision all he could by law charge upon the estate,—that is, for one child, one year's rent, to three or more, three years rent; fourthly, a bond of annuity and provision securing to his wife 800*l.* per annum; fifthly, making certain provisions for his mother and sister in the event of his being found to have dominion over the purchase money; and lastly, a trust deed of settlement, whereby he gave and disposed his whole heritable estate and effects in Great Britain to trustees, of whom Mr. Wardlaw was one, and whom he appointed his executor upon trust to pay his debts and legacies, and then one third of the income to his wife for life, the other annuity to be taken in part, and to pay over and divide the residue amongst his children, to be paid at twenty-one or on marriage; that he left only two children, Mary by his first marriage, who died in 1827, and Letitia by the appellant, who died 6th August

9; and that it was uncertain, owing to various cir-
stances, upon whom had devolved the right of
cession to the prices of the said lands so far as
nsumed, and to the other personal estate left by
and his daughters; and that conflicting opinions
e entertained on the point by different eminent
sel at the Scottish bar; and that a trial at law of the
intricate questions arising thereon must be attended
very great delay, expense, and uncertainty.

herefore, the parties agree that the free proceeds
he whole estate and effects left by Frederick and
daughters in Great Britain or elsewhere in Europe,
r than the entailed estates, should be equally divided
ween the appellant the widow, the respondent the
ther, and Mrs. Tennent the sister; but it was
ed that this arrangement should not extend to any
t of the entailed estates unsold or ineffectually dis-
d of at the time of Frederick's death, nor to any
te, property, or effects of him or of his daughters
America, the appellant taking such one third in full
ll other demands in right of her husband or of his
ghters, and the respondent taking his one third in
l of his claim under the agreement with Frederick
America, and all declaring that any testament which
derick had executed, if any such there be, in
ference to his property in America, should take effect
thout being affected by the agreement.

It is to be observed that there is no inaccuracy, in
int of fact, in the statement in this deed which could
ve misled the pursuer, of the two points relied upon
the pursuer, namely, the will of Frederick disposing
his personal estate, and the widow's title to the jus
icta. The existence of a will is referred to as affect-
property in America, and the share of the widow

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under the agreement is expressed to be in full of dow jointure, annuity, terce of lands, third of half or mo ables, and every thing else which she could ask claim through the decease of her husband or his daughters, or either of them, in any manner of way

It is, however, contended that the pursuer ent into this arrangement in ignorance of her rights u both these grounds, which rights, it is said, were s that if they had been understood by her would h prevented her from acceding to the terms, as she c had secured to her what she was at all events entit to, and that she thereby simply renounced all cha of a favourable decision in her favour upon the poi really in doubt.

It is necessary to examine accurately the evidence the cause as to these two points before the applicat of the principles of law to the case can be usefi considered.

In the first place it is to be observed, that there not the slightest ground for imputing any fraud, curement, or misrepresentation on the part of Profe Stewart, the other party to the negotiation. Indeed attempt was made to rest the pursuer's case upon conduct of his. Mr. Wardlaw must, I think, be sidered as acting for both parties as he correspon with both upon the proposed compromise, and be it was concluded, was in fact agent for both, and upon his conduct that the pursuer principally re After carefully examining all the documents in evid I have no difficulty in concurring in the opinion pressed by all the Judges below that there is no gro for imputing any improper motive to Mr. Wardlaw of any intention to favour the respondent at the expe of the appellant. There are indeed but two circu

stances upon which any argument in support of such a supposition can be founded. The first is his letter of 2d October 1830 observed upon by Lord Medwyn [1], and the other is the fact that Professor Stewart consulted other counsel before he signed the agreement by which it is inferred that he had obtained information upon the rights of the parties which the appellant had not. As to the latter, I do not find it in evidence what this advice was; and as the appellant had seen the opinion of Mr. (now Lord) Jeffrey and of Mr. Rutherfurd, now Lord Advocate, upon the whole case, in which the will is brought under notice, I cannot think the fact of another opinion having been taken by Professor Stewart of any importance. As to the expression in the letter of 2d October 1830, "Mrs. C. Stewart has never written "to me withdrawing her consent, although the decision "in the House of Peers has given the case a better "aspect in her favour;" it does not appear why that decision should have induced her to withdraw her consent. If indeed the decision had been the other way, there would not have been any thing upon which the agreement could operate; but as the proposition was made in contemplation of such a decision, there seems no reason why either party should upon its taking place wish to withdraw from it.

I must therefore assume, because such I think to be the result of the evidence, that Mr. Wardlaw acted fairly, honestly, and to the best of his judgment in concluding the arrangement complained of, and that the pursuer's case must stand upon an imputed error in law of the common agent of all parties [2].

[1] See Appendix to appellant's case, p. 63.

[2] *Lord Glenlee.*—"It was a very poor compliment to the agent to say "he had acted blamelessly. I have read the papers with a desire, if

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Of the principal question which existed between the parties it is not necessary to say much; I mean that of the domicile of Frederick, the appellant's husband. The circumstances created a serious difficulty. The facts were honestly and I think fairly stated for the opinion of two very eminent lawyers in Scotland. They thought the case doubtful, and recommended a compromise [1]; and if the provision of the property had taken place upon the principle of the chances of success being equal to both parties, upon that question there could have been no pretence for impeaching the arrangement.

Upon the question of the will I have felt no difficulty. No doubt the terms used are general enough taken by themselves to pass personal property of every description, but it is equally clear that such was not the testator's intention. By his bonds of provision in favour of his wife and children, and by the trust disposition, he had disposed of all he could dispose of in Great Britain. He then made the will, giving his personal estate to his wife, but referring to no subject matter except what was American; and next executed bonds in favour of his brother and sister burdening his Scotch estates, and by a holograph writ found by his widow with the trust disposition and will, he directs the will to be sent to America, and mentions the trust disposition as disposing of the property in Scotland. This will the appellant had during the whole negotiation in her possession, and it does not appear that Mr. Wardlaw had any knowledge of it; indeed the appellant's

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" possible, to discover a fault, but so far have I been from doing so " that I think it right to say that he acted a most friendly and judicious " part throughout."—*Rep. in F. C.*

1 See opinion of counsel, antea, p. 402.

letter of 17th March 1832 admits that he had not, but the agreement of compromise refers to it as applying to American property only. On 24th December the appellant having objected to the division of the funds under the agreement, demanded 1,000*l.* more from the respondent, stating that she was desirous of completing the agreement, but that she would not complete it on any other terms; and on 21st January 1832 she gave a receipt for 1,000*l.* to the respondent, which stated that it was paid in terms of the proposal contained in her letter of 24th December, and agreed to by his letter of 20th April, although she had before that time made a claim to all the property upon the expression used in the will, as appears by her letter of 17th March 1832.

Under these circumstances, it is not matter of surprise that the appellant did not in the first instance claim the property in Scotland under this will, or that having at last set up such claim, she abandoned it, and agreed to confirm the agreement without reference to it. Clearly, after this, there can be no question of impeaching the compromise upon any supposed title of the appellant to the property in Scotland under the will.

The only question of any difficulty remains to be considered, namely, the right of the appellant upon her husband's death to repudiate the provisions he had made for her, and to claim her jus relictæ. As to this the facts, as I collect them from the very numerous documents in the case, are as follow.

At the time of the death of the appellant's husband he had sold most, but not all, his entailed estates. The Court of Session had declared that he had a right so to do, but that he was bound to reinvest the purchase monies; against which latter declaration he had ap-

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pealed to the House of Lords, which appeal was then pending. In the disposition of his property he had provided for either event. If the judgment was to be affirmed, and the property therefore was to pass to the heirs of entail, he had, to the extent of his power, charged upon the estate provision for his wife and daughters, and by the trust disposition he had, in the event of that judgment being reversed, given to his wife a life income in one third, and the residue equally between his daughters. In the one case it is stated that the widow's income would be 600*l.* per annum, and in the other 800*l.*; but in neither, according to his disposition would she have any power over any part of the capital.

It is quite clear that pending the appeal to the House of Lords she could not repudiate the provision and claim the jus relictæ, because in the event of the judgment being affirmed there would be no fund upon which it could operate; and if she had been apprised of her right to elect, it is hardly to be supposed that she would have exercised it as against her own daughter, and her daughter-in-law; it appears in fact that she did take the benefit of the provision; indeed the receipt she gave to the respondent on the 21st January 1832 was expressed to be on account of the annuity payable to her from the estate of her husband to February 1831, the date of the agreement by which she in terms renounced all the provisions made for her by her husband, the jointure, dower, terce of lands, half or third of moveables, and every thing else which she could ask or claim through the decease of her husband or his daughters, or either of them, any manner of way. But this acceptance of his provision, and the renunciation of her rights as widow, ought not, it is said, to prejudice her; but that the compromise ought to

set aside because she was ignorant of her right to repudiate the provisions and to claim the jus relictæ; and notwithstanding some passages in her letters which were relied upon to prove the contrary, I think that the fair result of the evidence, unless she had for some reason abandoned it, is, that she was not aware of her having any such right, and that the agreement was concluded upon the supposition that her only title against her husband's property was to the provisions he had made for her. I think it equally clear that such was the impression upon Mr. Wardlaw's mind, for such were his representations both to the appellant and to the respondent. But whether this arose from any misapprehension of the rule of law, or from his knowledge of any act of hers amounting to or regulating her election, does not appear.

It is to be observed that in the memorial or case submitted to Mr. Jeffrey and Mr. Rutherfurd the facts material to raise this question are fully and fairly stated; and the sixth question put is, Whether Mr. Stewart's widow was entitled to any share of the succession? to which the answer was, "On the supposition of the laws of Scotland regulating the succession of Mrs. Stewart and her children, in which view alone this question is of importance, we are of opinion that the widow has no right whatever to any part of the funds, except in so far as she claims her share of the goods in communion or under Mr. Stewart's trust deed."

The opinion was sent to the appellant in a letter from Mr. Wardlaw, dated 6th April 1830, in which he tells her, that from the opinion she will find that if the law of Scotland is to be the rule she would get none of the money except the annuity for life; whereas, by the pro-

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posed division into three parts, she would have 20,000*l.* which would leave an income of about 800*l.* per annum, and the capital at her disposal.

This certainly does not accurately represent the opinion it purports to explain, unless he knew of facts excluding her election; and if he did not it is to me evident that this inaccuracy was unintentional. Indeed it appears that Mr. Wardlaw submitted a draft of the agreement to the same counsel, in which Mr. Stewart, in consideration of the one third of the proceeds of the sales, renounces all other claims; and in the letter to Mr. Rutherfurd which accompanied it represents it as in conformity to the advice they had given, and desires him to approve the draft if thought applicable to the circumstances. The draft was approved, and this reference being had to this letter was not incorrectly represented in Mr. Wardlaw's letter of 3d December as a recommendation of the measure, which was much observed upon as giving a character to the approval of the draft which did not belong to it.

Now this draft stated all the facts upon which the appellant's right to claim the jus relictæ depends. The inadequacy of the consideration now relied upon, regard being had to such right was as much submitted to the consideration of those very eminent counsel as it could have been to Mr. Wardlaw; but they approved of the draft, which they were only to do if they thought it applicable to the circumstances, and thereby may be supposed to have approved of the proposed terms of compromise without again raising or suggesting the point upon which it is now sought to be set aside. In fact, beyond what is suggested in the opinion of 3d April 1830, the point does not appear to have occurred to any of the parties; and the question is,

whether a compromise and arrangement fairly and honestly entered into, in which the party now complaining acted under the advice of a professional adviser, who called to his assistance two of the most distinguished counsel of the Scotch bar, is to be set aside, because a point was overlooked in that party's case, which, if thought of at the time, might have prevented her from agreeing to the terms proposed, as it might have made a very material difference in the relative situation of the parties.

It must not, however, be assumed she only got what she must at all events have been entitled to, because had she at that time repudiated the provision made for her by her husband, and claimed the jus relictæ, the benefit she would have taken would have been subject to reduction from some of the circumstances alluded to by the respondents counsel; but to those I think it unnecessary to advert, because as the difference between what she was supposed to be entitled to, and what she might have derived, was, even after such deductions, considerable. The principle how far such an oversight will entitle a party to have the whole arrangement rescinded, may be considered without ascertaining the precise extent of the loss it may be supposed to have occasioned. If, indeed, it had appeared that the respondent had, upon the faith of this compromise, abandoned a case which otherwise he might have prosecuted against a purchaser, of setting aside the sale upon the ground of deathbed, an answer would at once have been given to the pursuer's case, as it would be impossible to restore the respondent to his original situation. The estate in question is not indeed enumerated in the exception in the agreement; but the exception applies to other parts of the estate ineffectually disposed of,

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which it would seem must include a sale reducible upon the ground of deathbed. I do not therefore rely upon that as a material circumstance, but proceed to consider the rule of law in this country and in Scotland, with reference to the alleged error or omission in the legal advice under which the appellant was acting, when she executed the deed of compromise and arrangement; and in doing this it must be kept in mind, that the mistake is upon a point of law only, and that not of foreign but of Scotch law. All the facts raising the point of law were fully known to all the parties; and the point of law, mistaken or not, attended to was, that the pursuer was entitled to repudiate the provisions made for her by her deceased husband, and to claim the jus relictæ; whereas the negotiation and the compromise proceeded upon the supposition, that if the law of Scotland was to prevail, she could only claim the benefit of those provisions.

The English authorities (though in the result altogether they appear to me to establish a sufficiently clear principle,) are not all consistent. One of the earliest is Frank v. Frank in 1 Chancery Cases, 84. It must be assumed that the fraud there alleged was not proved; but there being no proof of the recovery, the eldest brother had given up the freehold lands to the younger without consideration, upon a misapprehension of fact. But yet the Court denied him any relief, upon the ground that modus et conventio vincunt legem. Cann v. Cann, in 1 Peere Williams, 723, though often quoted upon this subject, and though valuable as recognizing the doctrine, is not for the fact of it of much importance, because the party seeking to be relieved from the agreement of compromise failed to prove that he had been injured by it.

Lansdown v. Lansdown, in Mosely [1], p. 364, and also referred to in a note in 2 Jacob and Walker, 205, from the register's book, is a very strong case of setting aside a compromise, and a conveyance in pursuance of it; but it is impossible to ascertain the facts. It appears that fraud was alleged against the younger brother, and Hughes, who had advised upon the rights of the two, was made a defendant, which could only have been upon an imputation of fraud; and in Mosely it is said, that the Lord Chancellor's decree proceeded upon the ground of the deeds "being obtained by mistake "and misrepresentation;" but Mr. Jacob's extract from the register's book, no doubt correct, states the ground to be the deeds being "obtained by a mistake "and misrepresentation of the law." It is, however, to be observed, that in Mosely the eldest son is reported to have said, that he would rather divide the estate than go to law, though he had the right; and that the Court is represented to have said, that the maxim that ignorantia juris non excusat did not hold in civil cases, which it will be seen has not been a doctrine recognized in modern cases. In Stapilton v. Stapilton, 1 Atkyns, p. 2, Henry, the eldest son, being illegitimate, Philip, the second son, received no consideration for the arrangement by which the estates, of which Philip was tenant in tail, subject to his father's life, were divided between them; but Lord Hardwicke [2] approving the doctrine of Lord Macclesfield [3] in Cann v. Cann, that "an "agreement, entered into upon a supposition of a right "or of a doubtful right, though it after comes out that "the right was on the other side, shall be binding; "and the right shall not prevail against the agreement

[1] Case 190. [2] 1 Atky. 10. [3] 1 P. Wms. 727.

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" of the parties, for the right must always be on one " side or the other; and therefore the compromise of " a doubtful right is a sufficient foundation for an " agreement," and he therefore maintained the arrangement, and decreed a performance of what remained to be done to carry it into effect.

In Pullen v. Ready, 2 Atkyns, p. 587, there was an agreement to divide property between brothers and sisters, upon the assumption that all were entitled under a will; and the fact that one of them had married without consent, which was by the will made a ground of forfeiture, did not appear to have been adverted to. Lord Hardwicke enforced the agreement, and, with reference to the argument, that although the marriage having been without consent must have been known to all the parties, yet that the consequences in law might not, observed [1], " If parties are entering into an agree- " ment, and the very will out of which the forfeiture " arose is lying before them and their counsel, while " the drafts are preparing, the parties shall be sup- " posed to be acquainted with the consequences of law " as to this point, and not be relieved under a pretence " of being surprised with such strong circumstances " attending it."

Bingham v. Bingham, 1 Ves. sen., 126, was not a case of compromise, but of a sale by the defendant to the plaintiff of an estate which was already his, and a return of the purchase money was decreed at the rolls, upon the ground of mistake. This case does not bear, therefore, directly upon the present. If it were necessary to consider the principle of that decree, it might not be easy to distinguish that case from any other pur-

[1] 2 Atky. 591.

chase in which the vendor turns out to have had no title. In both there is mistake, and the effect of it in both is, that the vendor receives, and purchaser pays money, without the intended equivalent. In Gibbons v. Caunt, 4 Vesey, 839, Lord Alvanley, speaking of agreements of compromise, says [1], "If parties will, with "full knowledge" "of the doubts and difficulties" "as "to their rights," act upon them, though it turns out "that one gains a great advantage, if the agreement was "fair and reasonable at the time, it shall be binding. "There was a case before the Lord Chancellor, who "spoke to me upon it, in which it was held that the "Court will enforce such an agreement, though it "turns out that the parties were mistaken in point of "law, even supposing counsel's opinion was wrong."

Bilbie v. Lumley, 2. East, p. 469, is directly opposed to the doctrine upon which Lansdowne v. Lansdowne is stated in Mosely to have been decided, for it was held that money paid by one, with full knowledge or the means of knowledge in his hands of all the circumstances, cannot be recovered back again on account of such payment having been made under an ignorance of the law.

In Leonard v. Leonard, 2 Ball and Beattie, p. 171, Lord Manners, and, in Stockley v. Stockley [2], Lord Eldon, recognized the rule of equity as to agreements by way of compromise, particularly in family arrangements. In Dunnage v. White, 1 Swanston, p. 137, Sir Thomas Plumer refused to carry into effect an arrangement by way of compromise, but the circumstances were very peculiar. The parties had dealt with property which had belonged to the children, and over

[1] 4 Ves. p. 848. [2] 1 Ves. & Bea. 23.

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which they had no power, and the state of mind of one of the parties was relied upon in the judgment.

Gordon v. Gordon, in 3 Swanston, p. 477, proceeded upon a fraudulent suppression; but Lord Eldon fully recognized the rule, holding, that where there is good faith, honest intention, and full disclosure, if the members of a family will arrange their rights amongst themselves, their agreement will not be disturbed; because it is founded upon a supposition which imputes the character of legitimacy to the illegitimate, or illegitimacy to the legitimate.

In the third volume of Mr. Burge's excellent work[1], Commentaries on Colonial and Foreign Laws, p. 742, the authorities quoted from the civil law prove the recognition by that law of a similar principle. He draws this conclusion from them. Hence it is no ground for recalling the payment made under the compromise, that there was no cause for the compromise, and that nothing was owing. And again, the inadequacy of the benefit which the party may receive from the compromise, even though it should amount to lesio enormis, would not afford a ground for setting it aside, unless there had been fraud. It has indeed been said in some of the English cases, and particularly by Lord Alvanley, in Gibbons v. Caunt, 4 Vesey, 849, that the parties must be aware of the claims which are to be the subject of the compromise, and that they must act with full knowledge of all the doubts and difficulties that arise.

It is not necessary for the purposes of this case to inquire how far that exception to the general rule can

[1] Commentaries on Colonial and Foreign Laws generally, and in their Conflict with each other, and with the Law of England, by W. Burge, Esq., Q. C., 4 vols. Lond. 1838.

be supported, or how it is reconcilable with the principle, that mistake as to the law will not invalidate a compromise, because the claim of the widow to her share of the goods in communion is expressly pointed out to her, in the opinion of Mr. Jeffrey and Mr. Rutherfurd; and although it may well be supposed that she had not herself sufficient knowledge of the law of Scotland to understand the meaning of the terms used, they must be supposed to have been fully understood by her legal adviser, Mr. Wardlaw. It is true that he does not in his correspondence call her attention to this claim; and, he being dead, it is now impossible to ascertain from what cause this proceeded, whether because she had before elected not to make such claim, or from inattention on his part; nor is it material, because, in the absence of all evidence of fraud on the part of the agent, the client must be bound by his acts, and affected by the information he received. If it were necessary to show knowledge in the principal, and a distinct understanding of all the rights and interests affected by the complicated arrangements which are constantly taking place in families, very few, if any, could be supported.

That the laws of Scotland adopt the same principle as the laws of England upon this subject is proved by the passages quoted from Lord Stair's Institutes, b. 1. tit. 7. s. 9., and tit. 17. s. 2., and from the cases of Macalister v. Macalister, in 1830, 4 Wilson and Shaw, 142, and Dixon v. Monkland Canal Company, 5 Wilson and Shaw, 445, to which is opposed the single case of Hope v. Dickson, 1833, in 12 Shaw and Dunlop, 222, which was a case of homologation, and not of compromise.

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These authorities, indeed, prove that the principle is the same in the law of Scotland as in the law of England, and in the civil law; but as the instances in which it has been the subject of decision are comparatively few in Scotland, and as it has so frequently been the subject of adjudication by judges of the highest authority in this country, I have thought that it might be useful to bring together the principal cases in which it has been recognized and enforced in this country. The result is, that, in my opinion, the appellant has failed to establish any case of fraud or improper conduct in her agent, and that the points of law relied upon do not entitle her to be relieved from the arrangement she has entered into.

The interlocutor appealed from must therefore be affirmed, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

SPOTTISWOODE and ROBERTSON—ALEXANDER DOBIE, Solicitors.

[*6th June* 1839.]

(Appeal from the Court of Session, Scotland.)

JAMES EWING[1], WILLIAM DUNN, and the MAGISTRATES and TOWN COUNCIL of GLASGOW, Appellants.—*Attorney General* (*Sir John Campbell*)—*Knight Bruce.* (No. 13.)

REV. JOHN BURNS, D.D., and others. — *Lord Advocate* (*Rutherfurd*) — *Pemberton.* — *A. M'Neill.*

Poor.—Parish.—Stat. 39 & 40 *Geo.* III. *c.* 88.—Where lands had been disjoined and separated by act of parliament from a parish in which the same had been previously assessed for poor rates, and annexed to and made part of the extended royalty of a burgh;—In an action by the kirk session of the original parish against the owners and occupiers of houses on the disjoined lands for payment of the proportion of poor rates leviable on said lands, as if still liable to the original parish, and against the magistrates and council of the burgh, as liable in relief to the other private defenders:—Held upon construction of the act of parliament (reversing the judgment of the Court of Session), 1, That the owners and occupiers of houses on the lands so disjoined were not subject to their former liability for poor rates to the original parish, and also that the magistrates and council were not liable directly to the original parish, or in relief to the other defenders for such poor rates; 2, (also reversing as aforesaid) That an action directed not only against the alleged primary obligants but also against other parties as liable in relief to them, and a decree following thereon by which the parties as liable in relief

[1] Rep. 15 D., B., & M., 936.

were ordained to make payment of sums decerned for against the primary obligants, in the event of such primary obligants failing to pay, were incompetent.

Consuetude:—Held that usage, or acquiescence in a particular construction of a statute, founded upon alleged circumstances and practice, to which the individual defenders were not parties, could not relevantly be admitted as evidence of such construction to be binding on those defenders.

2D DIVISION.

Lord Ordinary Jeffrey.

Statement.

IN 1772 the property of the lands of Ramshorn and Meadowflat, part of and situated in the barony parish, was acquired by the magistrates of Glasgow. These lands continued to be liable for and to pay the assessments for the poor and other burdens to the barony parish, thus yielding a considerable sum in consequence of the increased value of the property and buildings thereon.

The magistrates of Glasgow having about the end of the last century contemplated an extension of the royalty by act of parliament, various communings took place betwixt the heritors of the barony parish and the magistrates with reference to the introduction of a clause into the proposed bill providing against the lands intended to be annexed to the royalty being relieved from supporting the poor of the barony parish. In the beginning of 1800 the trades house, who held part of these lands, passed the following resolution:—

"That the said provost, magistrates, and council would "not only free and relieve the inhabitants of the "barony parish whose property is to be annexed to "the royalty, of the statute labour, but also of the "poor's rates in the said parish."

In the year 1800 a statute was passed (39 & 40 Geo. 3. c. 88.,) intituled "An act for extending the royalty of

"the city of Glasgow over certain adjacent lands, for "paving, lighting," &c., "and for raising funds and "giving certain powers to the magistrates and coun- "cil, and town and dean of guild courts for the above "and other purposes."

In the preamble it was set forth that "it is just and "reasonable that the royalty of the said city should "be extended over those lands, in consideration of the "expense incurred in purchasing the same, and of the "further sums of money which must be expended in "paving therein, &c.; and also for the equal appor- "tioning of the public burdens and benefits among "all the inhabitants of the place."

By the second section the magistrates and council were "empowered to levy the same maills, duties, cus- "toms, conversion of statute labour, and other taxes "within the said annexed grounds, as they are en- "titled to levy within the present royalty."

By the third section it was provided, "that the "magistrates and town council shall hereafter pay, "from the money raised for the conversion of the "statute labour within the said city, to the heritors "legally appointed to repair and maintain the public "roads in the western district of the barony parish of "Glasgow, 5*l.* sterling yearly, as a conversion for the "statute labour of the said annexed lands, and shall "also, from the funds of the community of the said "city, relieve the holders and occupiers of houses or "lands in the said extended royalty of the poor's rates "payable by them to the said barony parish as having "been a part thereof before passing this act."

By the sixth section it was provided, "that it shall "be competent to the sheriff and justices of the peace

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" for the county of Lanark to exercise the same powers " and jurisdictions within the said lands hereby an- " nexed to and comprehended within the said royalty, " as are competent to the said sheriff and justices of " the peace within the ancient royalty."

The tenure of the lands continued in virtue of the seventh section unchanged.

By the eighth section it was enacted, " that the said " magistrates and town council shall have full power " to appoint stent masters, assessors, and collectors to " assess and to levy from the proprietors and occupiers " or possessors of the said annexed grounds, and of " all such houses as are built or hereafter shall be " built upon the foresaid grounds hereby annexed to and " comprehended within the said royalty, an equal and " rateable portion of the cess, trades stent, poor's rates, " conversion of statute labour, and other taxes payable " by the inhabitants of the city of Glasgow, in the " same manner as they are now levied within the " present royalty."

The tenth section provided, " that the several lands " hereby annexed to the royalty of the city of Glasgow, " besides the cess to be levied by the collectors of the " town for and in respect of the houses and buildings " erected thereon, shall remain liable and be subjected " to the payment of a rateable proportion of the cess " or land tax, and other public burdens imposed or " to be imposed on the shire of Lanark for and in " respect of the ground, which cess shall be paid by " the magistrates and town council of the said city " from the funds of the community, and shall be levied " in the usual manner."

The eleventh section enacted as follows:—" And be

" it enacted, that the said grounds hereby annexed to " and comprehended within the royalty of the city of " Glasgow, shall be and the same are hereby for ever " separated from the barony parish, and are hereby " annexed to the parishes within the said city to which " they lie most contiguous, or to which the magistrates " and town council shall by any act or acts of council " hereafter direct and appoint."

The twelfth section provided, "that the tithes payable " out of the lands hereby annexed shall be saved and " reserved to the true owners thereof in the same " manner as if this act had never passed."

The thirteenth section enacted, "that the right of " patronage of such church and churches as shall be " built and endowed by the community of the city of " Glasgow upon any of the said lands hereby an- " nexed to and within the said royalty, shall and the " same is hereby declared to belong to the magistrates " and town council of the said city, in the same " manner as they hold and enjoy the patronage of the " churches within the ancient royalty."

The fourteenth section was in these terms:—"Saving " always, and reserving to His Majesty, and all other " person or persons concerned, all rights and interest, " other than the present extension of the said royalty, " which they had, have, or may have in the lands " hereby annexed."

The act also contained provisions relative to paving, lighting, and cleansing the streets of the city, regulating the police, and appointing officers and watchmen, dividing the city into wards, appointing commissioners, raising funds, regulating markets, recovering penalties, and the limitation of actions, &c., which

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are followed by this proviso in section ninety-ninth:— "And be it enacted, that all regulations, provisions, "and other things whatsoever herein-before enacted, "shall be equally applicable and shall extend and be "construed to extend to the lands hereby annexed to "and comprehended within the royalty of the said "city, as to those comprehended in the ancient royalty "of the said city in so far as is consistent with the "former parts of this act, and excepting as herein-"before expressly excepted."

After this act of annexation took effect, and down to the year 1810, the heritors and kirk session of the barony parish raised the sums required for the support of the poor by assessing the heritors of the annexed lands according to the valued rent, the magistrates actually paying the sums so assessed. In the year 1811 it became necessary to increase the amount of the assessment for the poor, and to lay the valuation upon the real rent instead of the valued rent, thus making householders as well as heritors liable. The magistrates and council remitted to a select committee to inquire into the question of liability, who in a report expressed their conviction that looking to the statute the increased demand would not be resisted. The report was approved and acted on. It did not appear that the householders on the annexed lands were parties to this report.

The magistrates continued, down to 1831, to pay the share of the poor rates apportioned on the inhabitants of the extended royalty; the largest sum levied in any one year in respect of the property within the royalty being 1,795*l.*

In 1831 the barony parish having demanded from

the magistrates and council a larger sum than had been collected, the magistrates and council, in December of that year, intimated their intention to resist farther payments until their liabilities were judicially determined.

Two of the wealthy inhabitants of the extended royalty, Mr. Ewing and Mr. Dunn, were in arrear in the payment of poor rates for the respective sums of 27*l.* and 26*l.* for the years 1830, 1831, and 1832.

In June 1833, in order to try the question and to recover the large arrears of poor rates then due, Dr. Burns, and Dr. Black his assistant and successor, ministers of the barony parish, for themselves and the other members of the kirk session, and William Robertson, the collector appointed by the heritors and kirk session, brought an action against Ewing and Dunn as individual heritors and householders, and against the magistrates and council, founding on the provisions of the third and other sections of the aforesaid statute; and setting forth, "That the intendment, "legal import, and effect of the statute was to leave "the properties of the defenders and the other heri- "tors in a similar situation within the said extended "royalty, subject to a rateable share with those of all "the other heritors of the said barony parish, of the "annual burden of supporting and maintaining the "poor in all time coming, reserving the right of "heritors to relief of the sums from the magistrates "of Glasgow, as the burdens might arise or be im- "posed; or otherwise, to render the magistrates and "council of Glasgow, as representing the community, "directly liable to the pursuers and their successors "for such assessments as might be imposed on the

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" properties of the said heritors in the part foresaid
" the said extended royalty"; and concluding t
" the said James Ewing ought and should be decer
" and ordained, by decree of the lords of our cou
" and session, to make payment to the pursuers of
" sum of 27*l.* 6*s.* sterling, with the legal inte
" thereof, or of the foresaid respective portions there
(specifying the items); " and the said William Du
" ought and should be decerned and ordained,
" decree foresaid, to make payment to the pursuer
" the sum of 26*l.* 6*s.* 6*d.* sterling, with the legal inte
" thereof, or of the foresaid respective portions the
" as follows" (specifying the items), " reserving ri
" to the defenders and to each of them to claim s
" relief from the magistrates of Glasgow as they
" either of them may be able to establish in the p
" mises; or otherwise, in case it should be found t
" the magistrates of Glasgow are now directly lia
" to the pursuers in the said sums, then and in t
" case the Lord Provost of the city of Glasgow,
" magistrates of the said city, and the other memb
" of the town council thereof, as representing
" community of the said city, and their successors
" office, ought and should be decerned and ordain
" by decree of the lords of our council and sessi
" to make payment to the pursuers of the seve
" sums of money, principal and interest, above specifi
" and the said defenders ought and should be decer
" and ordained to pay the expenses of the process."

In defence Messrs. Ewing and Dunn pleaded, that they are not liable, in respect of their proper libelled, for the support of the poor of the barc parish, as that parish now exists, and are not liab

directly or indirectly, to be assessed therefor by the heritors and kirk session of that parish, or otherwise; 2, that on the contrary they are, along with the other inhabitants within burgh, liable for the support of the poor of the city of Glasgow allenarly; 3, that, having accordingly been assessed for the support of the burgh poor, and having regularly paid their assessments, the present action is wholly groundless as regards them, and they ought to be assoilzied simpliciter from its conclusion, with expenses.

The magistrates and town council, referring to the separate defences for Messrs. Ewing and Dunn, pleaded that the sole ground on which the pursuers pretend to rest their case against them, is the enactment in section three of the statute, viz., "That the said magistrates "and town council shall also, from the funds of the "community of the said city, relieve the holders and "occupiers of houses or lands in the said extended "royalty of the poor's rates payable by them to the said "barony parish, as having been a part thereof before "passing this act;" and such being the case, they were not liable to the pursuers in the sums pursued for, or in any part thereof.

The cause having been debated in the Outer House, Lord Jeffrey, Ordinary, 15th March 1836, pronounced the following interlocutor, with a relative explanatory note[1] annexed thereto:—"The Lord Ordi-

[1] *Note.*—"The Lord Ordinary cannot persuade himself that there is "any difficulty in this case, and thinks that it is impossible to read "attentively through the fourteen first sections of the act, as they stand "in their order, and entertain any doubt as to their true meaning and "effect.

"The defenders, at the debate, did not find it convenient to proceed in "this natural course. They went at once to the eleventh section, which

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" nary, having resumed consideration of the debs
" with the closed record, productions for the parti

" provides in general terms for the disjunction of the annexed lands f
" the barony parish, and their annexation to the parishes of the
" royalty: and then, contending that this disjunction, not being in
" way qualified or limited in its terms, imported a total separation,
" consequent liberation from all future parochial burdens in the pa
" from which they are disjoined, they went to the second section
" illustrated by the eighth,) to shew that they were accordingly
" jected to a new, and, as they maintained, substituted set of burden
" their new connection; and argued that, as a double liability was i
" case to be presumed without express words, this was a conclusive
" firmation of their views as to the effect of the absolute disjunc
" They then proceeded to point out the very different terms in whicl
" future payments of cess and statute labour money to the county,
" which the annexed lands were disjoined, are provided for in the act,
" the provisions there supposed to be made for future poor assessm
" and concluded by suggesting that these last provisions, which
" represented as being merely for relief from contingent and imagi
" claims, must have been inserted to satisfy the groundless anxie
" apprehensions of the owners of the annexed property, but could n
" be held to import that the claims themselves were just or maintain

" The Lord Ordinary takes a very different view of the object
" effect of the statute. It was enacted on the petition of the magist
" and for the purpose of conferring a great benefit on the city, by pu
" under its municipal jurisdiction, and subjecting to its burgal as
" ments, a very wealthy and flourishing quarter of the actual town; a
" same time, it was obvious that if this rich assessable district was
" entirely withdrawn from the parish and the county to which it form
" belonged, and exempted from all future contributions to their
" taxations, a great loss would be sustained by these communities, a
" proportionally heavier burden laid on what remained of them. It
" necessary, therefore, to provide for this by special enactments; a
" is impossible to read the act, and have any doubt as to the princip
" which these are framed. That principle is, beyond all question,
" the annexed lands shall be liable to a double assessment, but tha
" owners or occupiers shall only pay those chargeable for the city, as
" relieved of such as continued due to the county or parish, by the p
" funds, or some particular branch of the public funds of the city.
" this is the case as to the cess and all the other proper county bur
" and the statute labour, cannot possibly be disputed; and as there
" obviously as strong, if not still stronger, reasons for applying the
" principle to the assessments for the poor, the Lord Ordinary woul
" have hesitated to construe any doubtful or ambiguous words in the
" vision as to these assessments upon that assumption, and accordi
" the analogy of the kindred provisions, as to which there was no d

"and whole process, finds, that according to the just "and true construction of the act of the 39 & 40 Geo. 3.

"But in fact it does not appear to him that the words, even if they stood "by themselves, are in the least degree doubtful or ambiguous. The "provision as to the cess, &c. (section 10) is, that besides the cess to be "levied from the annexed lands for the town, they should also remain "liable to their rateable proportion of the county cess, and all other "county burdens; 'which cess,' &c. it is added, 'shall be paid by the "'magistrates and town council of the said city from the funds of the "'community.' Then, as to the statute labour, it is specially provided "(and obviously in terms of a previous agreement), that an annual sum "of 5*l.* shall be paid by the said magistrates and town council to the "heritors of the barony parish, 'as a conversion for the statute labour of "'the said annexed lands;' and then immediately after, and as the sequel "of the same section, follows the provision as to the poor rates, in these "words:—'And they (the magistrates and council) shall also, from the "'funds of the said city, relieve the owners and occupiers of lands and "'houses in the said extended royalty, of the poor's rates payable by them "'to the said barony parish as having been a part thereof, before pas-"'sing this act.' If this does not mean that the annexed lands were "still to pay poor's rates (as well as cess and statute labour money) to "the barony parish, and that the magistrates were to protect the owners "and occupiers, by paying these rates for them out of the public funds, "it is not easy to conceive what it does mean.

"Accordingly, the defenders are driven to great straits to give it a "meaning; and actually maintained, at the debate, first, that the whole "of this provision about the poor's rates really had no meaning, and must "have been inserted by mistake, or per incuriam; and next, that it could "only have been inserted to satisfy the groundless apprehensions of the "owners and occupiers as to possible, but evidently incompetent claims "on the part of the barony parish; or finally, that it might possibly "relate to the arrears of former assessments. It is not thought necessary "to make any remarks on these extraordinary suppositions.

"The variance in the phraseology, and indeed in the substance of the "arrangements as to the cess and other county burdens, the statute labour "and the poor's rates, on which the defenders dwelt largely, is very easily "explained. The principle, it has been seen, is the same as to all; but "the arrangements for carrying it into effect are naturally different, and "the expression accordingly varies. The cess being a fixed and invariable "sum, the provision is merely that it shall be annually paid over by the "city, and there was in that case no need for any other arrangement. "The statute labour assessment again was liable to fluctuation, though "not to any great extent; and it was quite practicable, therefore, and "seems to have been thought more convenient, to fix an average amount "in the statute, which should be paid in all time coming, as its conver-"sion. But the poor assessments were liable to great and incalculable

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" c. 88., the lands thereby annexed to the royal
". the city of Glasgow, and disjoined from the p

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" variations; and (as the result has shewn) no fixed average could
" been taken with any tolerable safety, as the rule of contribution
" time coming. They were, therefore, left to be settled as before
" annual assessments; and as these assessments must necessarily be
" on the individual owners and occupiers of the annexed propert
" burden taken by the magistrates is correctly expressed as an obli
" to relieve those individuals, against whom personally a charge mu
" been first constituted, before the amount to be paid for them
" magistrates could in any one year be ascertained. The whol
" visions, therefore, as to each and all of these county and parish be
" are not only perfectly congruous and identical in substance, bu
" particular arrangements and expressions as to each are judi
" adapted for carrying the principle into effect.

" After this plain exposition of the words of the act, it can scar
" necessary to say any thing as to the defenders main argument, th
" general terms of the express disjunction of the district in question
" the barony parish, must necessarily import a disjunction quoad
" The conclusive answer is, that the statute has not left the nat
" effect of that disjunction to inference, but has expressly provide
" enacted in what respects, and to what effect, the disjoined propert
" still be tributary to the parish from which it is divided, and has,
" especial manner, enacted, inter alia, that it shall still be liable to
" rates in that parish; in fact, there is no civil burden for which i
" not continue liable as before, both to the parish and the county
" while the annexation, with all its consequent liabilities, is comple
" total, it may be truly said that the disjunction can extend to
" siastical relations only; for there is nothing else left on which
" possibly operate.

" One simple and obvious question brings out the palpable fall
" the defenders whole argument. If it was really intended by the
" exempt the owners of the annexed territory from future poor asses
" in the barony parish, why was it not so provided? and above al
" was a clause inserted looking so very like a special provision the
" way? It could not be that the framers of the act trusted to the
" of the general words of the annexation and disjunction, for they
" nothing whatever to the operation of these words; every th
" separately and anxiously provided for. They do not rely on the e
" annexation and consolidation with the old royalty, even for the ext
" of the magistrates jurisdiction over the new territory; but this
" everything else, is specially enacted. But, unluckily for this tr
" hypothesis, there is a special clause about those poor's rates, ar
" defenders theory is, that it was introduced to quiet the idle fears
" annexed owners, as to the possible insufficiency of the general wo
" secure their exemption. Whoever else trusted to the virtue of

" of barony, and the owners and occupiers of the said " lands, or of the houses and buildings thereon, are

" words, therefore, it is certain that these owners did not trust to them; " and that the legislature knew this, and in order to remove their distrust, " is supposed to have put in this clause, binding the magistrates to relieve " them from their imaginary perils. The Lord Ordinary must say, that " this appears to him to be nothing short of a mere absurdity; if the " object was not only to secure these owners from the barony assessments, " but to quiet their foolish apprehensions of danger from them, was not " the plain way to do this, just to enact that they should be exempted? " or is it conceivable that, with this object in view, the legislature, having " full power to settle the whole matter by a word, should take this " indirect and really unintelligible course to effect it? It is needless to " add, that the whole phraseology of the clause excludes this strange " hypothesis. The magistrates are there taken bound to give relief, not " against possible claims, but against 'rates payable to the barony parish;' " and this relief is to be given, not by refuting the assessors, but by paying " them, not by a successful argument on the effect of the clause of disjunc- " tion, but 'from the funds of the community of the city.'

" When the case is so clear upon the construction of the act itself, " there is no need to refer to the powerful corroboration which this " construction receives from what confessedly preceded its enactment, or " from the interpretation which has, till very recently, been put upon it " in practice. It is quite certain that when the act was in preparation " the heritors of the barony parish required that satisfaction, both as to " the statute labour and the poor's rates, which the Lord Ordinary thinks " they have obtained by the clauses in question; and it is admitted, that " after they had submitted their amendments, they allowed the act to " pass without opposition. He is aware, however, that the admissibility " of such evidence, however powerfully it may influence the mind, is very " questionable, and, therefore, he in no degree rests his judgment upon it. " With regard to the subsequent practice, however, he inclines to think, " that when it has been uniform, of many years standing, and against the " interest of those by whose consent it has been established, it may " fairly be looked to for elucidating the true meaning of any doubtful or " obscure enactment; against a plain and precise statute, (at least since " the union,) no practice can be of any avail, and the Lord Ordinary " thinks the statute clear enough here. But the defenders can scarcely " deny, that in their view of its meaning, its enactments are full of " obscurity, and that it is competent, therefore, to refer to early and long " continued practice for their elucidation. Now, the practice in this case " amounts to no less than this, that ever since the passing of the act in " 1800 down to 1831, the magistrates, upon whose petition it proceeded, " have all along recognized their liability under the clause in dispute, and " have every year paid over large sums, varying from 300*l.* to 1,795*l.*, " their share of the barony poor assessments. In 1811, when the first

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" not relieved from their previous liability for the
" assessments made or to be made for the support of
" the poor of the said parish, along with the other
" lands, and the owners and occupiers thereof, within
" the said parish; and that the magistrates and town
" council of the said city are bound to relieve the
" owners and occupiers of the annexed lands and
" houses and buildings thereon of the whole of the
" said assessments made or to be made for the support
" of the poor of the said barony parish, by paying
" over from the funds of the community of the
" city the whole amount of the said assessments
" they have or shall become due to the proper officer
" of the said parish, or person entitled to collect and
" receive such assessments; and therefore repels the
" defences set forth and maintained by both sets of
" defenders: Decerns in terms of the conclusions of
" the libel against the defenders, James Ewing and

" great increase of these assessments took place, the matter was remitted
" to a select committee, who gave in a full and well-considered report,
" expressing their clear conviction, that the increased demand could not
" be resisted, and this was deliberately adopted by the Council, and acted
" upon ever after. In 1821, some objections having been taken, not to
" the general legality of the charge, but to the way of ascertaining its
" amount, another committee of the town council was appointed to adjust
" this matter with the barony heritors, which they accordingly effected, and
" gave in a long and elaborate report to the council, with a scheme for
" checking the assessor's charges in a particular way, which was also
" adopted and acted upon down till 1831. In that year a new light broke
" in upon the magistrates, and it was discovered, that they who framed
" and carried through the act in 1800 were altogether mistaken as to its
" meaning; and that their practice, and that of their successors for thirty
" years was against its true construction, as well as their own interest and
" duty to the city.

" The Lord Ordinary thinks, that a more extravagant allegation never
" was brought forward in a Court of Law; and sees nothing but the
" greatness of the interest at stake, which can explain the conduct of the
" magistrates in embarking in so unpromising a litigation."

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"William Dunn severally, for the sums of money concluded for against each of the said defenders, with interest upon the said several sums as libelled; and in the event of payment not being made of the said several sums by the said defenders, within twenty-one days after this interlocutor shall be final, decerns also against the other defenders, the magistrates and town council of the said city of Glasgow, and their successors in office, for such of the said sums as may then be unpaid: Finds the whole of the defenders, conjunctly and severally, liable to the pursuers in expenses; allows an account thereof to be given in; and remits the same, when lodged, to the auditor for his taxation and report."

Against this interlocutor a reclaiming note was presented by the defenders (appellants) to the second division of the Court of Session, and after hearing counsel their Lordships ordered cases on the whole cause; and thereafter, upon advising the cases, adhered to the interlocutor of the Lord Ordinary, and found the defenders (appellants) liable in additional expenses.

Judgment of Court, 17th May 1837.

Messrs. Ewing and Dunn and the magistrates appealed.

Appellants Argument.

Appellants.—The interlocutor of the Lord Ordinary adhered to by the Court is erroneous in point of form or substantial justice, and it is also ill-founded in its construction of the act. The error in the decerniture against the magistrates was pointed out to the Court, and, though adverted to by the presiding judge, was left uncorrected.

1. The kirk session might have a right to sue, but

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what right had they to sue the corporation? There may be a question of indemnity between the private defenders and the corporation, but the barony kirk session have no right, in suing the party liable direct to them, to sue also any third party who may be bound to relieve their supposed debtor. But the judgment goes even further than the illegal conclusion of the summons requires, for it finds that if the private defenders fail to pay then the corporation shall make payment; thus Ewing and Dunn have been found liable in the expenses of a record loaded with unnecessary parties. Or suppose the obligation thrown upon the corporation, as betwixt them and the barony kirk session, then Ewing and Dunn are unnecessary parties.

2. As to the question of liability of Ewing and Dunn the Court was so far right in holding that it turns upon the construction of the statute; and keeping in view those canons of construction,—(1.), that a Court must so construe an act as to make every part of the instrument effectual, if it can be made so; (2.), that a clear and precise intention expressed in one part of the instrument is not to be held by implication or otherwise to be repealed or annulled from ambiguous expressions in another part, and thence inferring a different intention by the granter, see Doe v. Hicks[1], a case which depended in Chancery as well as in the courts of common law, and in particular the opinion of Tindal, C. J., rep. p. 484; (3.), that no question is to be raised upon the order in which the clauses are to be read, as the whole must be read as forming one

[1] 8 Bingh. 475.

instrument, clearly there was complete disjunction by the eleventh section, in every respect, betwixt the annexed lands and the barony parish; and if they were "for ever separated" they thus became extra-parochial in all questions of jurisdiction and liability connected with the barony parish. Nay, more, the disjoined lands are declared to be assessable in an equal proportion of the poor rates payable within the royalty to which they are annexed. The Leith Case, Hill v. Cunninghame [1], in which the principle of double assessment was discountenanced, differs a little from this, but there is no substantial distinction betwixt the two cases; there were no express words of disjunction in that case; and if it was decided as that case was, where there were no words of disjunction, the magistrates here ought not to have been blamed for disputing their liability when there are express words of separation as well as annexation.

There is not,—as would have been requisite to meet the respondents view,—any express clause of reservation of the rights of the barony parish, as was introduced to save the rights of the county for cess and the tithe owners. Against the magistrates there is confessedly no direct clause of liability, neither can any subsidiary liability be contended for. The judges affirmed the interlocutor of the Ordinary, but differed on the grounds, Lord Medwyn, upon the construction of the act, rightly differing from the Lord Ordinary and the other judges, but finding himself tied up by usage. Now as usage, to which the private defenders were no parties, could not be admitted in evidence, the other judges improperly took that view, and went equally far wrong in their

[1] 25th June 1835, F. C., and 2 Sh. and M'Lean, 773.

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construction of the act, which Lord Medwyn put the right construction upon.

Respondents.—The question lies within the four corners of the statute; but still it is necessary to look to the pre-existing state of matters to which the act bore reference. Then, having regard to the language of the act itself, one finds that the construction, which it fairly admits of, is consistent with what was proved by extrinsic evidence to have been the intention of the parties, shown by their practice for the last thirty years. The heritors, and afterwards the heritors and householders, continuing to pay through the corporation just as the heritors paid before the act, redargues the presumption of separation, and shows that the separation was qualified so as to continue the liability of the separated lands to the barony parish, as well as what they should be liable for within burgh, the magistrates relieving them of the burden.

In construing a local act of parliament, if its terms be clear, there can be no relevancy in introducing usage or decisions of courts to control its meaning; but if the language be of doubtful meaning, and there have been decisions explaining it, a court is bound by the construction of other judges, even though originally there might have been room for letting in a different construction; not that usage of parties or decisions of a court can alter the clear meaning of the legislature, but that if parties, for a period of years, put a construction, by practical observance, upon the enactments of the legislature, the court is induced and is entitled to look to this contemporanea expositio in explaining clauses of contradictory or doubtful import.

If for thirty years the public has been in the practical observance of a statute, interpreting it by an uniform usage, a court of justice feels bound to give its support to that usage, which proceeds upon a direct recognition and no disregard of the act. Even in the construction of public acts usage is admitted,—King v. Hog [1], Stammers v. Dixon. [2] In Anderson v. Bank of England [3] the ground upon which the judges went when the case was sent for opinion at common law [4] was, that the documents objected to were understood to be included among modern bills, and that usage was, so far, a strong confirmation of the statute; and the House of Lords gave effect to the same principle in the case of Magistrates of Dunbar v. Heritors. [5]

Upon the point of form, there was nothing in the decree inconsistent with the alternative form of the summons. Now, both parties stated the same defence; if the private parties are not liable, then there is nothing in the clause of relief. The private parties cannot be allowed to plead that the action is good against the magistrates as liable in the claim of relief. The conclusions might have been directed against both sets of defenders; but there was no ground to complain that decree had been asked first against the private defenders, and then a decree of relief against the corporation in so far as necessary.

LORD CHANCELLOR.—My Lords, this case, which was heard before your Lordships a few days ago, was an appeal from the interlocutor of the Lords of Session,

[1] 1 T. R. 728. [2] 7 East, p. 200. [3] 2 Keen's Rep. p. 328.
[4] 3 Bing. new ed. 666. [5] 1 Sh. & M'Lean, 195.

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by which certain persons occupying lands in a distric[illegible] which formerly formed part of what is generally calle[illegible] the barony parish, contiguous to and now part of th[illegible] burgh of Glasgow, were decreed to make payment [illegible] an assessment imposed by the authority of the baro[illegible] parish; and the interlocutor proceeded to direct th[illegible] in the event of those individuals not paying, the corp[illegible] ration of Glasgow should pay out of the funds belongi[illegible] to that corporation.

My Lords, it appears to me extremely important dispose first of that part of the case which is a dec[illegible] against the magistrates of Glasgow; for, as your Lo[illegible] ships will very soon see if the interlocutor is clea[illegible] wrong in that respect, not only will that dispose of t[illegible] part of the case, but that will most materially affect [illegible] ground upon which the learned judges in the co[illegible] below have, as it appears to me, proceeded in [illegible] judgment they have formed.

My Lords, the act in which this interlocutor has been founded, as far as the magistrates of Glasgow are concerned, merely directs that "they shall also, from "the funds of the community of the said city, relieve the "holders and occupiers of houses or lands in the said "extended royalty of the poor's rates payable by them "to the said barony parish, as having been part thereof "before the passing of the act." My Lords, those are the words to which it will be material to call your Lordships particular attention in another part of the case, at present I consider them only as they affect the interlocutor against the magistrates of Glasgow.

My Lords, that is the only part of the act which has been relied upon, or can be relied upon, as imposing a liability on the magistrates of Glasgow; but, on

the authority of that proviso in that act, the judgment below has proceeded to direct payment by the magistrates of Glasgow to the authorities of the barony parish. Now, that can proceed only upon this, which is clearly unknown as a principle of the law of this country or the law of Scotland (and I am happy to find that that relieves me from any anxieties upon that subject), which is recognized in the judgment of the learned judges in the court below, namely, that a contract of indemnity between A. and B. is to be the foundation of a charge by the party contending to be actually indemnified against another party. If A. undertakes to indemnify B. against any liability to C. it is clearly a strange principle to contend that A. is consequently liable to C., and yet that is the only ground which I can find in this act, or the proceedings in this cause, on which the judgment of the Court of Session has been given against the magistrates of Glasgow, directing them to pay to the pursuers, namely, the authorities of the barony parish.

My Lords, the learned judges of the court below appeared perfectly aware of the irregularity in that respect, but I must say they pass over that irregularity much more readily than it appears to me it was judicious to do; they seem to think that, being of opinion the occupiers were liable, and that the magistrates of the district were liable, to indemnify the community against what they might be called upon to pay, it was a matter of little consequence whether they were directed to pay directly to the pursuers, or whether they were only to be liable in the mode in which it was by the statute imposed upon them. My Lords, it appears to me to be of the highest importance that these distinc-

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tions should be kept up, because, if not, all principl[illegible] may be set at defiance; if because in the abstract liability to pay exists, and by some circuitous pr[illegible] ceeding, practically the payment of that sum of mon[illegible] may be claimed, therefore the liability may be enforc[illegible] in a suit that is not calculated to give effect to th[illegible] liability.

My Lords, if then there is no ground for this, I h[illegible] the satisfaction of knowing, from the report of the p[illegible] ceedings in the court below, that three at least of [illegible] learned judges expressed their opinion, some m[illegible] strongly than the others, but all sufficiently to show, the opinion of three, I think, of the learned jud[illegible] below, the interlocutor was in that respect erroneo[illegible] My Lords, it will follow, of course, that whatever m[illegible] be the case between the authorities of the barony pa[illegible] and the occupiers within the ceded district, the in[illegible] locutor cannot be entertained as against the magistrates of Glasgow.

Now, my Lords, if that be so, your Lordships, adverting to the grounds on which the learned judges below have proceeded, will find that a great majority of them have founded their judgment, not upon the construction of the act of parliament so much as upon the course of proceeding which has been followed since the act passed; certainly the proceedings are of very considerable length, inasmuch as the act passed in the year 1800; but if in this suit the magistrates of Glasgow are subject to no liability, and if, as between the magistrates of Glasgow and the authorities of the barony parish, there is no privity, and therefore no liability, on the part of the magistrates of Glasgow to pay to the authorities of the barony parish, then it is

material to inquire if any such evidence was admissible between the parties on the construction of this act of parliament; whether there has been any practice of dealing between the parties in this case, who are the only proper parties to the litigation, namely, the occupiers in the barony parish,—the particular occupiers who have been selected for the purpose of compelling payment to the parish represented by them. The only evidence which has been so much observed upon at the bar, and which seemed to be so much relied upon in the judgment of the learned judges, is entirely that of transactions between the authorities of the parish and the magistrates of Glasgow.

Now, if the magistrates of Glasgow are entirely out of the suit, and they ought never to have been actual parties to the suit, and in adjudicating upon the rights of the parties to the suit, you may consider the magistrates of Glasgow as no parties to it, what evidence is there of transactions between the parties to the suit? That is, what evidence of practice is there, if evidence is admissible at all as against the occupiers, to show that they have by conduct of theirs, or conduct of those having interest in that property which they now possess, which for that purpose might be the same—what evidence is there to show that they have entered into any obligations not imposed by the provisions of the act? My Lords, there is obviously none. It is unnecessary in that view of the case therefore to inquire how it has happened that this course of dealing has taken place between the magistrates of Glasgow and the authorities of the parish. A very natural solution, I think, has been suggested, that as they were before the act passed in the habit of paying a small sum for a

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particular district, that payment was continued without adverting to the particular provisions of the act. The attention of the inhabitants of the town was called to it only when the demand became so large as naturally to force itself upon the attention of those whose duty it was to consider the interests of the town.

My Lords, then I proceed to consider how the case stands as between the pursuers and the individuals occupying lands, and in respect of that possession of property being called upon to pay rates for the relief of the poor.

My Lords, there are two points which may be considered as free from all doubt, and which in point of fact have not been the subject of any dispute, namely, that ordinarily speaking, and without any special provision in the act for that purpose, the liability to contribute to the poor rate of the parish can only affect those who are the occupiers of property within the parish. No doubt an act of parliament may impose that liability upon any individual, but if there be no act of parliament, if there be no statute for the purpose, then the liability is confined to those who are within the parish, and so the authorities of the parish have considered, because the rate is imposed on the property in the parish, the right, therefore, and the exercise of that right are in this case entirely consistent.

Well, then, the question is really a very simple one, when it comes to be considered whether there is any thing in the act which take this case out of the ordinary rule of law. Is this property occupied by these two defenders within the barony parish, or is it not? Now, my Lords, in the South Leith case there was not an act of parliament which took the land out of the parish of

South Leith, and annexed it to any parish in Edinburgh, but there was an act of parliament which included it within the royalty of the city of Edinburgh, and gave the magistrates of Edinburgh a right to levy rates on that ceded district. Some difference of opinion prevailed in the Court of Session how this was to be carried into effect, and how far the lands in question were or were not liable to pay the rates to the parish of South Leith. When it came to your Lordships House those difficulties were removed; and though there was in that act no provision taking any of the lands out of the parish of South Leith, and annexing them to any parish in Edinburgh, your Lordships held that the act having imposed this liability on the lands to pay rates to the magistrates of the city of Edinburgh, that was sufficient to relieve them from the liability to pay rates to the parish of South Leith. My Lords, that case, therefore, would be applicable to the present if there had not been in this act that which you find in the eleventh section most clearly and explicitly enacted, and if there had not been such provisions in the act directing the lands in the case to which I have referred. According to the opinions of all the learned judges it appeared to them, that no question would be raised as to the liability of the inhabitants to contirbute to the rates of South Leith under the eleventh section; the question is not, whether there is any obligation by the statute to pay rates not within the parish, but whether those lands are or are not within the barony parish, or whether they are taken out of that parish and annexed to other parishes.

My Lords, upon that point there is no ambiguity; the words are "such lands hereby annexed to and com-

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"prehended within the royalty of the city of Glasgow "shall be and the same are hereby for ever separated "from the barony parish, and are hereby annexed to "parishes within the said city to which they lie most "contiguous, or to which the magistrates and town "council shall by any act or acts of council hereafter "direct and appoint." After that enactment had passed the legislature, and had become the law of the land, it is impossible for any man to contend any longer that those lands are within the barony parish. Then, if they are not within the barony parish, how is it that they can be made liable to rates? No doubt this act might have done what it did with respect to tithes, what it did with respect to cess, what it did to a certain extent with respect to statute labour; it might have enacted, that although all these lands ceased to be part of the barony parish, and therefore were placed in a position which would not make them liable to contribute to the rate for the relief of the poor of that parish, yet that they shall for certain purposes be still within the barony parish, and not only shall be within the barony parish, but that they shall contribute their proportion of the rates raised within that parish.

The question then is, has the act said so? My Lords, there are various sections in this act which if there were any doubt on the eleventh section would clearly manifest the intention of the legislature that this should cease to be part of the barony parish. It has said expressly that it shall not be for that purpose, and it is not necessary to advert to the other parts of the act. If it had not said so, and there had been any doubt whether or not this land were part of the barony parish, would not that afford the strongest possible

proof that it was no longer to be continued part of the barony parish, because if it continued to be part of the barony parish the liability to tithe would of course remain? But the act has taken care to provide for the interest of those entitled to receive tithe, a provision which would have been unnecessary if the lands had continued part of the parish; and, accordingly, it provides "that the tithes payable out of the lands "hereby annexed shall be and the same are hereby "saved and reserved to the true owners thereof in the "same manner as if this act had never passed."

My Lords, a similar provision is inserted with respect to the cess, although that perhaps is of more importance as keeping it within the county of Lanark than within the parish, except so far as this, that the parish being assessed for a certain contribution to the county, if these lands had been taken out of one parish and put into another, while the same sum would have been to be paid by the parish out of which this was taken, of course that would have thrown an additional burden upon those who remained occupiers and possessors of land within the parish, to the extent of the sum which otherwise would have been contributed by those whose lands were taken out of it, and, therefore, it was extremely proper that provision should be made to prevent the other inhabitants of the parish so suffering. The act therefore provides what it would have been unnecessary to provide if those lands were to remain within the barony parish, namely, that the same sum shall continue to be paid as had been paid for those particular lands.

So, with regard to the statute labour, the framers of the act conceived that the inhabitants of the barony

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parish ought not to be sufferers by the loss of the amount of statute labour that had been contributed by the occupiers of those lands, and therefore the corporation undertook (and all this is matter of arrangement, which is found in the act itself) to pay a certain annual sum as compensation to the parish for that loss which they would otherwise sustain by the loss of that land. Your Lordships see therefore that there is a distinct enactment that these lands shall not continue within the parish, and you find in the three instances to which I have referred that a distinct provision is made, reserving to a certain extent compensation to the parish for the loss which the parish would sustain from those lands being taken out of it. Now, if there had been any intention in the act to extend a similar provision to the subject of poor rates, why did not the act contain some provision similar to that which is to be found with regard to those several other objects, but there is no such provision.

It was said by some of the learned judges in the court below that the reason was obvious, because the one was a fixed and the other an uncertain amount. That is no reason why there should not be a distinct enactment, that the land should be liable; the amount of charge would be still uncertain, but the obligation to pay that which would have been payable in respect of those lands would have remained and might have been as much the subject of a distinct enactment as the provision with regard to tithes, or cess, or statute labour, but there is no such provision in this act.

My Lords, the other provision in the act is to be found in the third section, and it is the same section which provides for the contribution by the magistrates

in lieu of statute labour, which makes it still more strong, and, in my opinion, still more free from doubt, that if there had been any such intention it would have been distinctly enacted in the act. That very section (the third) does distinctly enact, with regard to statute labour, "that the magistrates and town council shall "hereafter pay from the money raised for the con- "version of the statute labour within the said city to "the heritors legally appointed to repair and maintain "the public roads in the western district of the barony "parish of Glasgow, 5*l.* sterling yearly, as a conversion "for the statute labour of the said annexed lands." There is no ambiguity or doubt as to that enactment. Then these words follow, "and shall also, from the "funds of the community of the said city, relieve the "holders and occupiers of houses or lands in the said "extended royalty of the poor's rates payable by them "to the said barony parish, as having been a part "thereof before the passing of this act." The obligation as to statute labour is, that the magistrates shall pay to the parish; there is no such obligation with respect to the poor's rates, but the only obligation is that the magistrates shall from the funds of the community of the city relieve the holders and occupiers of lands of the poor's rates payable by the occupiers of the annexed lands to the barony parish. Now, why was that change? Why was not the principle of enactment which is applied to the statute labour applied also to the poor's rates? There can be but one reason, namely, because it was not the intention of the legislature that such a provision should be contained in the act. It was intended with regard to statute labour that there should be a liability on the magistrates to pay over a certain sum to the

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authorities of the parish. If there had been any such intention with respect to the poor's rates, beyond all doubt it would have been made applicable to the circumstances of the case, and would have been found in the act with regard to the poor's rate also, but there is no such provision to be found, the only enactment being that there shall be a liability to indemnify the occupiers in respect of the poor's rates payable by them as having been part of the parish before the passing of the act. If there had been any thing wanting in the other parts of the act to show that this land had ceased to be part of the barony parish, it would have been the very expression, "as having been a part thereof before "the passing of the act," in the particular section which is relied upon as creating the obligation between the magistrates of Glasgow and the authorities of the parish; there is here an express recognition in the provisions of the act that the lands had ceased to be part of the barony parish.

My Lords, it is said that some sense must be given to this section; some sense no doubt must be given to it if possible. It is desirable to give a good sense to the section, but some sense must be given to it consistent with the expressions to be found in it; and when the section is used for this purpose, and treated as a matter so clear that no doubt can be entertained by any reasonable person as to the meaning of it, I beg your Lordship's attention to the consideration, how it is possible that the framers of this act could have had the intention, which is now imputed to them, in this section, namely, that the lands in question, though separated from the barony parish, should continue to pay to the authorities of the parish a portion of the

rate rateable on the parish. There is no such enactment; there is a mere contract of indemnity on the part of the magistrates and town council undertaking to indemnify the parties in respect of any possible claim. Now the language of the section clearly refers to something either existing or past; the words are "the poors' "rate payable by them to the said barony parish as "having been a part thereof before passing this act." Now what poors' rate was payable in respect of lands because they had been part of the parish having ceased to be part of the parish? No lands can be liable to the poors' rate because they once belonged to a parish after they have ceased to be part of the parish, but if there is an assessment on property not yet paid,—if there is a liability arising from the lands having been within the parish,—then there would be a claim to make good that which must otherwise be made up out of what remains part of the barony parish, however small the amount might be; it is very natural that they should be held liable for the rates imposed before this became a a part of the city, and that the parish should require to be secured and indemnified even for the half year's rate that would be payable before the expiration of the poors' rate imposed upon the parish.

My Lords, the second question is, whether this proviso undoes all that the other provisions of the act intended to do, namely, to remove the lands from the barony parish, and annex them to the city of Glasgow; whether it is intended to subject them to the parish rates, though removed beyond the limits of the parish. The terms do not require that, and there is no doubt it would require a very distinct enactment to do that where the lands were made liable to contribute to the

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city assessment. If it was intended that they should also remain liable to the barony parish, we should expect to find a distinct clause continuing the old rate while they would be liable to the new. In the act with respect to South Leith there was no such provision; there was no such separation of the lands of South Leith, but they were held to be discharged from payment in the one parish because they were liable to pay in the other. The principle of a double payment was held to be so objectionable in itself that it would require a very direct enactment; but your Lordships would, if you entered into the views of the respondent, put a construction upon the act in effect imposing a double liability. I find nothing from which it is to be inferred,—I find an unequivocal declaration, that the lands have ceased to be part of the barony parish, and I find no enactment by which, being so separated from the barony parish, they can be held or made liable to the poors' rates imposed upon that parish.

My Lords, for these reasons I have very anxiously looked into this case; seeing the very strong opinions which have been expressed by the learned judges in the court below, I have been led to review the conclusion to which I came upon the hearing, to an extent leading me to exhaust every means in my power to ascertain whether there was any ground for the construction of the court below; but on the fullest consideration I have come to a conclusion directly the reverse; and having done so I feel it my duty to advise your Lordships to reverse the interlocutor of the Court of Session. And, my Lords, this being a claim by the authorities of the parish, first of all, against the magistrates, and for which there was no case, and next, against the occu-

piers of these houses on a claim of liability to which they are not subject, it is but just that the parties making that claim and failing in the claim should pay the costs of the proceeding in the court below. The expense of the proceeding in this house being an appeal against the judgment of the court below is not matter of question; but the course I should propose to advise your Lordships to adopt is, to reverse the interlocutor of the Court of Session, and to assoilzie the appellants from the conclusions of the summons, and to direct the respondents to pay the costs in the court below.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal be and the same are hereby reversed, and that the appellants be assoilzied from all the conclusions of the summons: And it is further ordered, That the said respondents do pay or cause to be paid to the said appellants their costs of this suit in the Court of Session in Scotland.

RICHARDSON and CONNELL—DEANS and DUNLOP, Solicitors.

[*6th June* 1839.]

(Appeal from the Court of Chancery, Ireland.)

(No. 14.) ALICIA O'CONNOR and others, Appellants.
[*Knight Bruce—Pemberton—Lowndes.*]

JOHN MALONE, Respondent.
[*Attorney General (Campbell)—Jacob—Hall.*]

New Trial—Verdict—Evidence—Venue.—A party in a cause in equity to establish the trusts of a will under which he claimed estates of great value, stated and adduced evidence that he was the eldest legitimate son of a marriage of his parents in January 1801, and an issue having thereafter been sent to trial at law, the evidence at which trial adduced by the same party went to show that the marriage had taken place in January 1802, and the party having got a verdict; and the Court of Equity having, upon motion by the adverse parties, ordered a new trial, before a jury of the same county, upon payment of the costs of the former trial, and allowed the former verdict to be used in evidence at the new trial, Held, 1, (affirming in part said order,) That a new trial ought to be granted, in respect that the issue sent had not been satisfactorily tried, the case made at the trial being different from that made in equity; 2, (further affirming in part said order,) That manifestations of applause by one or more of the jury at the close of the speech to evidence of the counsel for the successful party at the trial, was no sufficient reason for altering the venue, or for directing the new trial to be had in one of the counties where the estates in question were situated; 3, (reversing in part said order,) That the verdict obtained on the former trial ought not to be given in evidence on the new trial of the issue; 4, (further reversing in part said order,) That costs of the former trial ought not to be allowed to the party who got the verdict, but that said costs ought to be reserved.

Observed, per L. C., When a Court of Equity has directed an issue to be tried at law, in order to ascertain the facts by which that court is to be guided in the exercise of its equitable jurisdiction, and after a trial of such issue thinks fit to order a new trial of the same, it is not the practice of the Court of Equity, in making such order, to interfere with or take any notice of the former verdict, to the effect either of setting aside that verdict, or of allowing it to be given in evidence on the new trial; and that a practice which had prevailed in the Court of Chancery in Ireland, of setting aside the former verdict on ordering a new trial, was erroneous.

COURT OF CHANCERY, IRELAND.

Lord Plunket, Chancellor.

IN 1836 John Malone (respondent) filed a bill in the Court of Chancery in Ireland with the view to establish a title as heir tail male to estates of great value in Westmeath and other counties in Ireland, devised by the will of the Right Honourable Anthony Malone, dated in 1774. In his amended bill the respondent set forth that he was the eldest legitimate son of Captain Richard Malone deceased, who was the second son of Richard Malone, the brother of the original settlor; and that the marriage of his parents had taken place on the 22d day of January in the year 1801, in Townsend Street chapel in the city of Dublin.

Mrs. O'Connor and others (the appellants), trustees under settlements of said estates, by their answer denied the legitimacy of the respondent, and maintained that the alleged marriage of the respondent's parents was illegal, the same having been solemnized by a Roman Catholic clergyman, the respondent's father being at the time and for twelve months previously a protestant. Issue was joined, and witnesses examined for both parties in the Court of Chancery. After several witnesses had been examined for the

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respondent, but before publication, the appellants solicitor discovered that there had been a son born of the same parents at Preston in Lancashire, in the month of June or July 1801, and baptized by the name of Anthony Malone in the Roman Catholic chapel at Preston on the 26th of July 1801. The solicitor for the appellants apprised the solicitor for the respondent of this circumstance. After publication it appeared from the depositions that several of the respondent's witnesses, including the mother of the respondent, had given evidence that the father and mother of the respondent had returned from Preston, and ceased to reside there in the end of the year 1800; and that they had been married, as stated in the amended bill, in the city of Dublin on the 22d of January 1801.

The cause came on to be heard on the 13th of November 1837, whereupon, by consent of parties, the Lord Chancellor of Ireland (Lord Plunket) directed an issue be tried in the Court of Queen's Bench, "whether the plaintiff was the heir at law of Richard "Malone deceased, who was the son of Richard "Malone, one of the brothers of the Right Honourable "Anthony Malone in the pleadings mentioned?" That issue was tried before Mr. Justice Crampton and a special jury of the county Dublin, and a verdict had for the plaintiff (respondent). In stating the case at the trial, the respondent's counsel announced that the witnesses in the equity cause had been mistaken as to the true date of the marriage of the respondent's parents, which had really taken place in January 1802; and evidence was accordingly adduced by the respondent to prove that the said marriage had taken place in Dublin in January 1802.

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The appellants applied by motion, with notice, to the Lord Chancellor Plunket, to set aside the verdict on the ground of surprise on the trial and variation from the case made in the equity cause; and also that a new trial might be directed before a jury of any county save the county of Dublin. The motion was grounded on the judge's report of the trial, and on affidavits by the appellants solicitor, that said solicitor said relied on the respondent attempting to prove that said marriage had taken place in January 1801, and that Anthony, the elder brother of the respondent, had died without issue, and that the appellants were prepared to prove that said marriage could not have taken place in 1801. The affidavits of the solicitor and his clerk further set forth, that two of the jurors clapped and applauded in the jury box on the conclusion of the speech to evidence of the respondent's counsel.

Order by Lord Chancellor of Ireland, 19th Feb. 1838.

The Lord Chancellor of Ireland (Lord Plunket), on the 19th of February 1838, made the following order:—"It is ordered that the motion for changing "the venue and for setting aside the said verdict be "refused; that there be a new trial of the said issue, "with liberty to the plaintiff on such new trial to give "such former verdict in evidence as he may be ad- "vised, the defendants to pay the costs of the former "trial, the costs of the motion to abide the result of "such new trial."

The appellants appealed. The petition of appeal praying in substance that the above order might be varied, by directing that the former verdict should be set aside; and that the new trial of the issue might take place before a jury of some county in Ireland

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where the lands in question or some of them lie, and that the appellants should not pay the costs of the former trial.

Appellants Argument.

Appellants.—A new trial had been ordered, and was absolutely necessary, not merely in reference to the amount of the property at issue, but also regard being had to the proceedings at the trial, which showed that a verdict so obtained was as worthless as the inconsistent evidence on which it proceeded. The former verdict had not been set aside, although it was the practice in Ireland to do so in ordering a new trial, and the Lord Chancellor of Ireland had not said whether he was satisfied with that verdict or not, but had ordered a new trial, and had allowed the former verdict to be given in evidence on a new trial. Now, where a new trial had been ordered, the former verdict had always been set aside; it might not always have been so in form, but in substance that was the nature and effect of the order for again trying the question. There was no difference in the form of order whether the judge be satisfied or not. In Seton on Decrees[1] there is the form of an order for a new trial of an issue in Watmore v. Watmore[2], where certainly, if the former verdict be not expressly set aside, there was no order that it should remain part of the proceedings, or be given in evidence at the new trial. In Locke v. Colman[3], and in Mudd v. Suckermore[4], where new trials had been ordered, the former verdict had been entirely disregarded, and no order made for giving it in evidence. The reason why the former verdict could not

[1] p. 350. [2] M. R. 14 Feb. 1815. [3] 2 My. & C. 42. [4] Rolls 1835.

be entertained as part of the proceedings, a new trial being judged necessary, was, that a verdict cannot be made evidence at law until it has ripened into a judgment, and then it is conclusive betwixt the same parties in the same matter. See Phillips's Evidence by Amos [1], and the case of Vooght v. Winch [2], and the cases therein cited. In equity, the Court, seeking to inform its mind, may order a new trial, as in Stace v. Mabbot [3], Cleeve v. Gascoigne [4], and in Harder v. Sise, cited in 2 Vernon, 285, in which last case there were five trials, and a case in Lord King's time, noticed in 2 Ves. sen., p. 554, by Lord Hardwicke in his judgment in Cleeve v. Gascoigne; but nothing had been said about giving the former verdict in evidence. But the authorities upon the point were supposed to be controverted by the judgment of Lord Hardwicke in the case of Baker v. Hart, twice reported [5], and which case required explanation and investigation. In Atkyns, Lord Hardwicke is made to say, "Where it "is a matter of inheritance, the court without setting "aside the first verdict, for the more solemn determi- "nation, in some cases direct a second trial; and if "the court direct such trial without setting aside the "former verdict, then the former may be given in "evidence, and will have its weight with the jury, and "therefore it is a very material difference to the "parties; because, if I was to direct a new trial on my "setting aside the first verdict, the defendant would "lose the benefit of urging the first verdict in his "favour at another trial."

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[1] vol. 2. p. 510. 8th edit.

[2] 2 B. & Ald. 662.

[3] 2 Ves. sen. 553. See also Ves. Sup. 429.

[4] 1 Amb. 323-24.

[5] 3 Atk. 542; S. C. 1 Ves. sen., 27.

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Appellants Argument.

In Vesey senior[1] the expressions are, "the applica- " tion here is not to set aside the former verdict; and " in doubtful questions relating to inheritances a court " of equity frequently grants a new trial without " setting aside the former verdict, which is of great " consequence to the parties, for then it may be given " in evidence, though not conclusive, either party " being at liberty to show on what grounds it was " obtained; but courts of law in that case always set " the former aside." But both reports were now understood to contain an inaccurate account, both of the facts of the case and of the order made for the new trial. The registrar's books, however, correctly set forth the order, and it appeared there was no order about giving the former verdict in evidence on the second trial.

The conduct of juries had frequently been made the ground for directing a new trial of issues, see Dent v. Hundred of Hertford[2], East India Company v. Bazett[3], in which last case a verdict was held not satisfactory, as the jury had been under great difficulty, and there was not a period sufficient for consideration, between the existence of the difficulty and its removal. Lord Eldon observed, "There is this difference between a " motion for a new trial in a court of law and in a " court of equity. In a court of law if a jury find the " fact, though the judge may think differently, yet it is " permitted to stand, for the finding of the fact is the " province of the jury; but here the verdict is somewhat " more than the verdict of the jury, it must be such " as to satisfy the Court that it can make that its own

[1] p. 28. [2] 2 Salk. 645; 1 Strange, 642. [3] Jacob, 91.

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"declaration of the fact which the jury have made "theirs." [LORD CHANCELLOR. A court of equity does not set aside a verdict at law; it only declines to act upon it.] Neither was there any practice in Ireland to sanction the giving the former verdict in evidence, Harrison v. Cumming, in 1808, being the only case in Ireland found upon a search of the records.

2. The venue ought to be changed. The circumstances under which the former verdict was returned, indicated a feeling and partiality not merely in the minds of the individual jurors animadverted on, but a strong prejudice in reference to the matters under investigation; one of the counties where the lands in dispute lay ought therefore to be preferred.

3. Costs ought not to have been awarded. There may have been cases in which costs were awarded[1], even where a new trial had been granted, but never where the verdict was so objectionable as this was, being plainly not such a verdict as could ever be deemed satisfactory by the court that directed the issue; and the blame clearly lay with those who got up a case so inconsistent with that made in equity.

Respondent's Argument.

Respondent.—The value of the property in question might be deemed a good reason for enabling the parties to try the issue again, before being concluded upon claims, the ascertainment of which had been attended with difficulty. But there was nothing else in the case to justify the application for setting aside the former verdict, or for disturbing the order in so far as it allowed that former verdict to be submitted along with the

1 Cleeve v. Gascoigne, 1 Amb. 323; So, in Stace v. Mabbot, 2 Ves. sen., 553.

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evidence to be adduced on the new trial. The course which the appellants had adopted in supporting their application, made it incumbent upon the respondent to go fully into the judge's report of the trial, to ascertain how far it was such a verdict as must have been satisfactory to the court that directed the issue. For it was very clear that the admission or rejection of portions of evidence which ought, in strictness, either to have been excluded or let in, formed no sufficient ground for insisting that a court of equity must set aside or disregard the verdict; as that court, seeking merely to inform itself as to the facts upon which its determination might rest, looked to the effect of the evidence in judging how far the verdict was satisfactory; see Bootle v. Blundell [1], Hampson v. Hampson [2], Barker v. Ray [3]; in which last case Lord Eldon [4] observed, "Issues are "directed here to satisfy the judge, which judge is sup- "posed, after he is in possession of all that passed upon "the trial, to know all that passed here; and looking at "the depositions in the cause, and the proceedings "both here and at law, he is to see whether on the "whole they do or do not satisfy him. It has been "ruled over and over again that if on the trial of an "issue a judge reject evidence which ought to have "been received, or receive evidence which ought to "have been refused, though in that case a court of law "would grant a new trial, yet if this court is satisfied "that if the evidence improperly received had been "rejected, or the evidence improperly rejected had "been received, the verdict ought not to have been "different, it will not grant a new trial merely upon

[1] 19 Ves. 494. [2] 3 Ves. & Beam. 41. [3] 2 Russ. 63. [4] p. 75.

"such grounds." Now the report of the judge who tried this case did not express any dissatisfaction with the verdict, neither had the Court of Equity in Ireland held it unsatisfactory. Indeed, a careful consideration of the report of the trial showed that no other verdict would have been satisfactory to that court, and therefore parties were not to be excluded from the benefit of a previous investigation, the verdict on which could not be impugned. It was not sufficient to allege surprise at the trial, unless it was surprise of such a nature as must necessarily have prejudiced the cause by producing a different result from what the other party might have been prepared to bring about. Besides, it was admitted, that the appellants were aware that there must have been some mistake, and that the marriage could not have been had in January 1801, and that the respondent could not have been the eldest born after a marriage in that year. And the question being whether the respondent was the eldest legitimate son of a marriage betwixt certain persons named, and a marriage being proved, there could be no prejudice to the appellants, when the effect of the whole evidence was looked to, and the mistake explained. The admission of the former verdict was urged on the authority of Lord Hardwicke in Baker v. Hart [1], who, in both the reports of that case, was made to use the expressions as if familiar in the practice of the court at the time.

2. The venue had for obvious reasons been fixed in the county of Dublin, where the prejudice upon questions of local importance must have been less than in the counties where the lands were situated. Any manifes-

[1] 3 Atk. 542.; 1 Ves. sen. 27.

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tation of feeling (supposing it to have been as stated in the affidavits) could not attach disabilities to other jurors impartially chosen.

3. Costs were properly found by the court not dissatisfied with the verdict, and which allowed that former verdict to be used on the new trial.

Ld. Chancellor's Speech, 14th Mar. 1839.

Lord Chancellor.—My Lords, this is a case of very great importance, not only from the value of the property in question, but on account of the peculiar circumstances which appear to have taken place in the court below. Upon the case itself, therefore, from the opinion which has been entertained by the court below by a very eminent and learned person, your Lordships perhaps will think it advisable, whatever the impressions of your Lordships may be, to look very carefully through the papers before you proceed to give your final judgment upon this appeal.

But my Lords, there is another reason which induces me to advise your Lordships not to proceed further at the present moment. In the course of this discussion a question has been raised shewing a practice in the courts of equity in Ireland, which is certainly quite inconsistent with the practice which exists in the courts of equity in England. Now, my Lords, there is no reason whatever why the practice of the courts in the two countries should be different. It certainly does appear to have raised a great difficulty in explaining the case of Baker v. Hart[1]; for the practice might be somewhat different in Lord Hardwicke's time, and can only be explained by supposing that the practice in

[1] 3 Atk. 542.; S.C. 1 Ves. sen. 27.

ty in this country is different from that in Ireland. Lords, in order to ascertain that, I have directed a :h to be made from 1750 backwards, in order to whether those expressions attributed to Lord Hard- e in the case of Baker v. Hart are or are not sup- ed by the authorities in the Court of Chancery. That :h has not yet been completed, but as far as it has , there is no instance to be found in which the r has set aside the verdict, or in which there is con- ed any direction as to giving or not giving that ver- in evidence on a new trial. I shall very shortly be ished with the further result of that inquiry, which ve directed to be made; and I believe, before I call r Lordships attention to this case again, which I pose to do in the course of next week, that I shall ible to get some further information upon the point o what passed in the court, beyond what is found the printed reports and in the registrar's book. It is extremely important question in this country and in eland; and on so important a point in equitable juris- ction it is desirable that your Lordships should have the information before you upon that subject, before finally dispose of this case.

udgment deferred.

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ORD CHANCELLOR.—In this case the Lord Chan- or of Ireland directed a new trial of an issue which d previously been tried, for the purpose of ascertain- g who was the heir at law of Richard Malone. Upon e propriety of the new trial no question has been made; t three points have been raised as to the propriety some of the directions given upon that order for ew trial. The order directed that the verdict which obtained upon the former trial of the issue should

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be laid before the jury upon the second trial, and be used as evidence; it directed the appellants to pay the costs of the previous trial; and another point contended for here by the appellants, as having been erroneously disposed of below, is that the trial which is to be had should not be in the county where the former trial was had, namely, in the county of Dublin.

My Lords, the question therefore for your Lordships to consider is, in the first place, whether the order for the new trial ought to contain the direction with regard to the verdict upon the former trial. It certainly struck me as a very singular direction, and when the case was argued at your Lordships bar, I had no recollection of any such provision being contained in any order for a new trial. I did not even recollect that I had ever seen an order, in which the court had taken notice of the verdict in a former trial. I directed searches to be made, and after the most diligent searches which the registrars of the Court of Chancery have been able to make, carrying them back for two centuries, there is no instance found but one, which I shall presently call your Lordships attention to, in which an order for a new trial has taken any notice of the verdict in the former trial. The reason is perfectly obvious. In a court of law the verdict is a necessary part of the proceedings in the cause; it is the foundation of the judgment of the court. If therefore the verdict which has been obtained is not such a verdict as in the opinion of the court to be properly the foundation of a judgment, the court puts the case in a train for having it tried again; and it necessarily sets aside the verdict, inasmuch as the opinion of the court is, that that verdict ought not to be the foundation of the judgment to be pronounced. But when an issue is directed by a court of equity

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there are no further proceedings upon the verdict; the object of the verdict is to satisfy the court of equity as to the facts. It is not therefore a case in which any thing further is to be done. All that a court of equity does in directing a new trial,—the mind of the judge being made up upon the evidence, or the result of the evidence,—is to put it into a course of further investigation, in order better to satisfy himself of the facts before he proceeds to adjudicate upon the right of the parties.

In this case it was said the new trial was granted not on account of any thing unsatisfactory which had taken place on the first trial, but because as it concerned the inheritance of an estate, the parties proceeding at law would in the ordinary course of things have had an opportunity of trying their right over again in several ways; and therefore that it was not thought proper on the part of the Lord Chancellor of Ireland that he should at once determine the rights of the parties without giving them an opportunity of another trial; and two cases were cited upon that point which were before me,—one when I was Master of the Rolls, and the other when I was in the Court of Chancery. These cases are Locke v. Colman, in 2 Mylne and Craig, p.42, the other Mudd v. Suckermore[1], which was before me at the Rolls, and in which I proceeded upon that principle. Mudd v. Suckermore was not in its circumstances the same as the present case, although it involved very much the same principle, because that was not the case of an issue directed by the court for the purpose of informing the mind of the court, but it was a case in which the court superseded the proceedings in the cause, giving

[1] Rolls, 1835.

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the parties leave to bring an ejectment; and the question was, whether an ejectment having been tried, and the question being with respect to the inheritance of an estate, the court should proceed to an adjudication without giving the parties an opportunity of another trial. And I observe that in my note of the judgment in that case, I drew the very distinction to which I have now called your Lordships attention. I observed, "There "distinction between these cases in which the court "directs an issue, and those in which it gives the "plaintiff an opportunity of establishing his title at law, "is most important to be attended to. In the first, "the object is to ascertain the facts by which the court "is to be guided in the exercise of its equitable juris- "diction, and therefore necessarily takes upon itself "cognizance of the evidence at the trial, and grants or "refuses a new trial without regard to those rules "which guide a court of law upon this subject. In "the other, it only suspends its proceedings till the "right is settled at law; and being so settled it acts "upon that without regard to the evidence upon which "such right has been established or inquiring whether "it was properly established or not." Therefore the case of an ejectment brought with the permission of the court, and an issue directed by a court, are not analogous, and do not come within the same principles. At the same time it is quite true that the court does as it did in Locke v. Colman[1], where there was a question of right to be ascertained depending upon the custom of a very extensive manor; I thought it right, although there was no objection to the trial, that there should be an o-

[1] 2 My. & Cr. 42.

unity of again investigating the circumstances upon h the right of the party depended, by a new trial. ut, my Lords, I cannot think that that applies at all his case, because it appears to me, without entering ll into the particulars,—which I carefully avoid, as matter is to be tried again,—that there was enough he circumstances of the first trial to make it the of the court not to act upon that verdict, but to the parties an opportunity of again proceeding to . The party claiming as heir had in the equity e stated the marriage of his parents, under which efore he claimed as their legitimate issue, as a mar- e in January 1801. That was the case he made in pleadings, and it was the case he proved by witnesses he cause where witnesses were examined, who spoke he marriage as being in January 1801. It appeared the parents of the claimant had gone to Lancashire, that some evidence was to be obtained there. Both ies went into Lancashire; and then the party osed to this claimant found that in the summer, month of August, I think, of 1801, another child ned Anthony) had been born and baptized there; at if the marriage had taken place in January 1801, plaintiff could not possibly be the heir, because e was thus another brother, Anthony, born sub- ently to the marriage, and anterior to the period he birth of the plaintiff. It appears that that fact brought to the attention of the agent for the claim- ; notwithstanding which, when publication took e, and the cause came to be heard in equity, it eared that witnesses had been examined and proved, hen I say proved, I say they deposed to the marriage ng in January 1801.

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The issue was then directed, and the parties w down to trial, and when they came down to trial appeared then for the first time (there is some evide of there being a communication made to the oppo agent before), but I say the first time with referenc any evidence given on the trial,—that the claim set up a marriage not as in January 1801 but as January 1802, which of course displaces Anthony, was born in the summer of 1801.

Now, whether such marriage be hereafter to established or not I do not at present at all inquire must necessarily be the subject of further investiga of the evidence before it goes to a new trial; a shall therefore carefully abstain from saying any t which can lead to a supposition that I have form very conclusive opinion as to the evidence upon w the claims of the parties are to be decided. But quite clear that, under these circumstances, the p who went to trial to meet the case to be made out not at all prepared to meet the case which was bro before the court. He might have had a certain success if the case of the claimant had been adh to as at first set out; because, if the claimant had tinued to set up his title under a marriage in Jan 1801, all that it would have been necessary for defendant to do would have been to show the birt Anthony in the summer of 1801, and the case have gone against the claimant.

Now this may have been a misapprehension or statement on the part of the witness, and may b right on a further trial; but it cannot be said the trial which has taken place was at all calculat try the real question between the parties. For

reasons I think it was quite right to grant a new trial. Upon that there is no dispute. But the ground upon which a new trial is to be granted is in order to try that over again which has not been satisfactorily tried, arising from the misapprehension (as I take it for the present purpose) of those who acted for the claimant in referring the marriage to another year, namely, 1801 instead of 1802.

But that is not the only point raised with reference to the grounds upon which a new trial is granted, although it is no doubt a very important one. With regard to the direction in the order, that the verdict in the former trial may be used upon the second trial,—why is that verdict which has been obtained under such circumstances to be used upon the new trial? If the case goes down to the jury for a new trial, with the order of the Lord Chancellor of Ireland that the verdict may be used upon that trial, it is all but directing the jury to find the same verdict on the second trial, because it is telling the jury that the Lord Chancellor is satisfied with that verdict; and if the Lord Chancellor is satisfied with that verdict, no doubt it would naturally make a very strong impression upon the mind of the jury that they ought to be satisfied with it also, unless there is some very important variance in the evidence between that produced on the first trial and that produced on the second. Again, if the Lord Chancellor was satisfied with the verdict, why should he send the case back to a jury? or why should he in terms direct the jury to take notice of that verdict, when by granting a new trial he has in substance declared that he does not think proper to give credit to it himself, at least to the extent of adjudi-

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cating upon the rights of the parties in respect of th verdict? The case therefore stands entirely by itse No instance has been produced in which the court h directed a verdict to be used. If the verdict be eviden without such direction, of course that direction is i proper, because then it is giving it as legal eviden an importance beyond that which ought to be given it. If, on the other hand, it be not legal evidence, th it is directing the jury to try the rights between t parties upon that which the law does not recognize legitimate and proper evidence. Upon the quest therefore, whether the order ought or ought not contain the direction to use that verdict upon the n trial, I have not, from the beginning of the argum up to this time, entertained the slightest doubt.

But that raises another point perhaps not very important in the present case, but important as showing a considerable variance in the practice in Ireland from that which prevails in this country, and which in cases where the circumstances are precisely similar would be undoubtedly inconvenient, and ought to be altered, unless there is some good reason for it. It was stated, and I think that appears upon the cases with which your Lordships have been furnished, that the course of proceeding in Ireland is to set aside the verdict in directing a new trial; I would observe that that appears to me to be an erroneous proceeding. Th inquiries which I have had made into the cases in th country, carried back for nearly two centuries, do furnish any instance but one of such a proceed and when I refer your Lordships to that one ca does appear to me that there is quite sufficient circumstances of that case to explain how it ha

that such a provision is to be found in that order. The only case to be found is that of Harcourt v. Cresswell in 1723, and it is furnished to me by one of the registrars of the Court of Chancery, but evidently we have not the terms of the order. Whether the order contains that I am not able to say; but what fell from the Lord Chancellor in giving his judgment was in these words:—"To set aside the verdict as being against "evidence or for excessive damages; for the trial being "directed to satisfy the conscience of the court, and "there appearing to have been means used to influ-"ence the jury, the conscience of the court cannot "be satisfied with the verdict; therefore set aside "the verdict and proceed to a new trial, and commit "the party who is found guilty of tampering with the "jury." It is quite obvious that that is not the order, but that these were the words which fell from the court at the time the order was made.

Now that case, and a case which I shall presently refer your Lordships to, namely, a case before Lord Hardwicke, are the only authorities I believe to be found in the records of the court, or in any records at all, foreign to the existing practice of not setting aside the verdict, or at all interfering with the verdict which has been obtained. The case which has been referred to, which was before Lord Hardwicke, is Baker v. Hart, which is very imperfectly reported in Atkyns.[1] I have, from the registrar's book, obtained a full note of the order and of the proceedings; and what appears to be the real history of that case explains some of the expressions attributed to Lord Hard-

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wicke, and which, according to the statement of t facts in Atkyns, are not at all intelligible. That a is a case where an ejectment was brought; the qu tion of legitimacy there turning upon the fact of date of the marriage of the supposed husband and mother of the claimant. The claimant brought ejectment, and obtained a verdict; affirming, the fore, the validity of the marriage of the pare Afterwards a bill was filed, and the same question raised, and two issues were directed; first, whe the daughter of the parties was the heir of the fat and upon that if the jury should find that she was the heir of the father, then whether the other pa claiming was the heir of the father. Those two iss went down to trial, and the jury found that t daughter was the heir of the father. Necessaril therefore, if they found that the daughter was legi mate she would stand first, and the other would n be the heir. There were three verdicts; the verdi in ejectment, and the verdicts upon those two issue Now in that case Lord Hardwicke is made to expre himself in these words:—"Where it is a matter " inheritance the Court, without setting aside t " verdict, for the more solemn determination, in so " cases, direct a second trial; and if the Court dire " such trial without setting aside the former ve " dict, then the first may be given in evidence, an " will have its weight with the jury. And therefo " it is a very material difference to the parti " because, if I was to direct a trial on my settin " aside the first verdict, the defendant would lose t " benefit of urging the first verdict in his favour " another trial." His Lordship is made to say that

had been stated by the judge who tried the issues, that the jury had been very much influenced by the verdict in the first trial. That must necessarily be in verdicts for ejectment, where the two are tried together. Those expressions, attributed to Lord Hardwicke, would assume that it was the practice of the Court of Chancery, upon an application for a new trial, to set aside the former verdict. But, my Lords, if any such practice existed, it would have been found of course in the registrar's searches, but no instances have been found except the one to which I have now referred.

I cannot therefore consider that that is the practice of the court. How those expressions of the Lord Chancellor are to be explained it is not now necessary to inquire. The investigation I have had made satisfies me that the impression which I entertained at the time this appeal was heard is correct,—namely, that it was not the practice of the court in directing a new trial to take any notice of the former verdict. Lord Hardwicke, it would appear from the report, assumed that if there is nothing said about the former trial, the verdict may be given in evidence. My Lords, I apprehend that Lord Hardwicke could not so have expressed himself, it being a well known rule of law that a verdict without judgment is no evidence at all, and the reason why at common law the courts will not receive as evidence a verdict without judgment is stated to be, because it does not appear that it may not have been set aside or disregarded, or that the court may have thought proper not to act upon it. There can be no judgment upon a verdict obtained in an issue directed from a court of equity. If, indeed, there be an order in equity acting upon the verdict, it would give the same quality and sanc-

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tion to the verdict which a verdict after judgment has at law. But when the court of equity for any reasons thinks proper to send the issue to a new trial, I apprehend that a mere verdict would not be evidence in the second trial of the issue; and whether it were used or not, it is quite obvious that the jury would be directed by the judge not to pay attention to the verdict which the court in granting a new trial had thought proper to disregard. Those expressions of Lord Hardwicke really appear to me to be quite unintelligible with reference to the known practice of the courts of equity.

I have thought it desirable, seeing that the practice in Ireland was a practice somewhat different from that which existed in England, namely, of setting aside the verdict where a new trial was directed, to call the attention of your Lordships to the state of the proceedings, in the hope that the courts of equity in Ireland may think it expedient to adopt a course of practice which has always prevailed and does now prevail in this country.

I therefore propose to your Lordships to reverse the order of Lord Plunket in so far as it has reference to the former verdict, leaving it as a simple direction that the parties should proceed to a new trial.

My Lords, the next point is with reference to the costs. The order of Lord Plunket directs the parties in applying for a new trial to pay the costs. In the view which Lord Plunket seems to have taken of the conduct of the parties, I was not very much surprised that that direction is contained in the order, because if it merely were an order applied for, and for the security of the respondent, it might be right to make such an order to indemnify him against the costs of the

hat assumes that there is no objection upon of the former trial, and that the party ap- is not any ground of complaint against the of the parties on the other side in the former d I take it that that is his Lordship's view se. But without expressing any opinion as sult of the evidence or the probable result trial, I certainly see that looking at the con- he respondent upon the first trial, there was e whatever of the appellants obtaining from ls of the jury a fair decision upon the real between them. Differing therefore as I do Lord Chancellor of Ireland upon that point, I y differ from him as to the propriety of the he has given with regard to costs. It appears at the costs of the former trial ought to be and the court will see better how to dispose iestion of costs when it sees how the rights :ties are established by the verdict.

egard to the other point of which the appel- ıplain, or rather the variation in the order ey ask for, that the trial may take place in er county, and not in the county of Dublin, ıly fact stated as a ground for changing the the indecorous manifestation of feeling ex- y the former jury, not upon the verdict being ed, but at the conclusion of the address of sel for the claimant. On the one side that ıted to too much feeling in some of the jury r of the claimant; on the other side it is l to mere admiration of the very eloquent hich had been concluded by the counsel. ɔne nor the other would justify the jury in

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the expression of feeling or applause in which some of them indulged; but I cannot consider the fact of some gentlemen of warm feelings happening to be upon that jury as disqualifying another jury of the county of Dublin from exercising the duty which devolves upon them of trying the question. It is very well known that in most instances there is more feeling in the county in which the property is situated than in another county where the jurors selected are not likely to have any connexion with either the one side or the other. I do not think there is any sufficient case stated to induce the House to alter the venue, or to direct the second trial to be had other than in the county in which the former trial took place.

The result, therefore, if your Lordships concur in the view I take of this case, will be to order a new trial, directing the costs to be reserved, and striking out that part of the order which takes notice of the former trial.

The House of Lords ordered and adjudged, That the said order of the Court of Chancery in Ireland, in part complained of in the said appeal, be varied, by omitting so much thereof as directs that the plaintiff be at liberty on such new trial to give the said former verdict in evidence, and that the defendants Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, the trustees, do pay the costs of the former trial; and that, subject to such variation, the said order be and the same is hereby affirmed: And it is further ordered, That the question of the costs of such former trial be reserved till after the new trial directed by the said order shall have been had.

Pemberton, Crawley, & Gardiner — W. R. King and Son, Solicitors.

[11*th June* 1839.]

(Appeal from the Court of Chancery, Ireland.)

EDWARD SHEEHY and others, Appellants.[1] (No. 15.)
[*Pemberton—Jacob—James Russell.*]

MATHEW FITZMAURICE DEAN, Lord MUSKERRY, Respondent.
[*Knight Bruce—Sir W. Follett.*]

Leasing Power.—Question: Husband and wife, by post nuptial settlement, convey part of the wife's estates to a trustee to the use of the husband for life, remainder to their eldest son for life, and with an ultimate remainder in fee to the husband, and a power to him to lease "for "any term or terms of years or lives, and with or without "covenants for renewal, and in case of the determination "of all or any of the aforesaid lease or leases to make "new or other leases thereof in manner aforesaid, and "with or without any fine or fines, as he should think "fit." He was also empowered "to raise or levy, by "sale or mortgage, any sum or sums of money not "exceeding in the whole 20,000*l.*, or to charge the "premises therewith," for such uses as he should appoint, and to charge to any amount for younger children. The husband and wife afterwards executed three leases of portions of the estates comprised in the settlement, for terms of 999 years, upon which fines were taken. One of the leases contained a clause permitting the lessee to graff and burn the surface, and also a clause of surrender; and another contained clauses making the lessee dispunishable for waste, and permitting him to cut

[1] Reported in Lloyd and Goold's Rep. temp. Sir E. B. Sugden, C. 183, and 1 Lloyd and Goold, 182.

timber, &c., and to graff and burn the surface, and in this lease was included part of the wife's estate not comprised in the settlement; the latter lease, and also the third lease, were made subject to existing freehold leases. The amount of the fines received upon the making of these and other leases was 10,208*l.* The husband subsequently mortgaged those estates, subject to the aforesaid leases, for a sum of 10,500*l.* The mortgagee filed a bill of foreclosure in the Court of Exchequer, and obtained a decree, in pursuance of which the lands were sold, subject to the leases. The first tenant in tail under the settlement filed a bill, impeaching the said decree, and also the leases as having been made contrary to the leasing power. Whether the leases were an undue exercise of the leasing power? — Remitted for reconsideration.

Practice — Enrolment of Decree — Rehearing. — Circumstances in which, without deciding on a ground of appeal, that a decree alleged to have been duly enrolled was incompetently opened, and a rehearing allowed, it was held (recalling the decree on rehearing), that parties were not bound by their consent at such rehearing not to take another case for opinion of court of law; — and the cause remitted to court below to hear parties as to the validity of said leases.

COURT OF CHANCERY, IRELAND.

Sir E. B. Sugden and Lord Plunket, Lords Chancellors.

IN 1732 John Fitzmaurice, being seised of an estate in fee simple in possession in the lands of Springfield, subject only to a legacy of 1,000*l.* charged thereon for his sister Mary, by ante-nuptial settlement conveyed Springfield to trustees, subject to the legacy of 1,000*l.* to the use of himself for life, with remainder to the first and other sons of his said intended marriage in tail, with a power to himself to charge the lands with 4,000*l.* for the younger children of his marriage, and in default of issue male of his marriage remainder to himself, his heirs and assigns.

There was issue of the marriage one son, John unger), and a daughter, and upon the marriage of latter in 1759, John (elder), by virtue of the above rer, charged Springfield estate with 4,000*l.* and 1,000*l.* e sister's portion he had paid off), and conveyed the ds for a term of 200 years upon trust to raise the n of 5,000*l.* by sale or mortgage, which charge became ted by mesne assignments in John Godley. Previous 1760 John Fitzmaurice (elder) had purchased fee ple estates called Farrihy and Gurtaheedy, and after death of his wife Anne, having married Hester tleton, he conveyed to trustees, by a post-nuptial set- ment, in 1763, the Farrihy and all other estates in merick county of which he had power to dispose, to use of himself for life, remainder to Hester for life, whom he also granted a life use after his own death his personal estate. John Fitzmaurice (younger) d in 1775 intestate, leaving an only child, Anne; and er him, in the same year, died John (elder), also estate, without issue of his second marriage, leaving me his grand-daughter and his heiress at law, and ster his widow, him surviving. In 1775 Anne, then minor, married Sir Robert Tilson Deane, afterwards rd Muskerry; and in 1776, in order to terminate isting differences between Hester the widow and Sir bert, a deed of compromise was executed between ster and Sir Robert and Anne his wife, whereby on recital of the settlement of 1763, in consideration Hester assuring to Sir Robert all her right and inte- st in and to the real and personal estate of her late husband, she (Hester) and Sir Robert conveyed to trustees the Springfield and Farrihy and Gurtaheedy states, for a term of 99 years, with powers to lease or

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mortgage the same, to secure to Hester an annuity of 1,083*l.* 6*s.* 8*d.* in and subject thereto, in trust for the use of Sir Robert and Anne his wife, and the heirs and assigns of the latter.

Anne attained majority in 1779, when there being two sons of the marriage, a settlement was executed on 25th May 1779 between Sir Robert and Anne his wife of the first part, and Thomas Lloyd of the second part, whereby for assuring the lands therein mentioned, and for making a provision for a jointure for the said Anne, and a further provision for the children of the marriage, they granted to Lloyd, his heirs and assigns, the Springfield and Farrihy estates (the property of Anne), to the use of Sir Robert for life, without impeachment for waste; remainder to Anne for life, without impeachment for waste; remainder to Robert Fitzmaurice Deane, their eldest son, for life, and to his first and every other son in tail male; with remainder to the second son, John F. Deane, for life, without impeachment for waste; with an ultimate remainder to Sir Robert; and it was thereby agreed, "that it shall and "may be lawful to and for the said Sir Robert, from "time to time and at all times during his life, to lease "or demise all, every or any part or parts, parcels or "parcel of the aforesaid towns, lands, tenements, here-"ditaments, and premises, for any term or terms of years "or lives, and with or without covenants for renewal "and in case of the determination of all or any of the "aforesaid leases or lease respectively, from time to "time to make new or other leases thereof in manner "aforesaid, and with or without any fine or fines as "shall think fit;" and it was also agreed, that it should "be lawful to and for the said Sir Robert to change

and encumber all and singular the said towns, lands, tenements, hereditaments, and premises aforesaid, or any part or parts thereof, with any sum or sums for the younger child or children of the said Sir Robert begotten or to be begotten on the said Dame Anne, in such proportions and manner, and payable at such time or times, as he shall by deed or will appoint;" and further, that it should also "be lawful to and for the said Sir Robert to raise and levy, by one or more sales or mortgages of all or any part of the premises, any sum or sums of money, not exceeding in the whole the sum of 20,000*l.*, or to charge the premises aforesaid therewith, to and for such use and uses as he shall at any time or times by deed or will appoint."

By the same deed Sir Robert and his wife covenanted that they would, before the end of the then next Trinity term, levy a fine of the said towns, lands, tenements, and hereditaments unto the said Thomas Lloyd and his heirs, to the uses of the said indenture of settlement.

In the same deed there was an endorsement signed and sealed by Sir Robert and his wife, in the following words:—"It was agreed between the parties within mentioned, previous to the execution of the within deed, that the within-named Robert Fitzmaurice Deane and John Thomas Fitzmaurice Deane, and every other child of said Sir Robert Tilson Deane and Dame Anne his wife, who shall, under the limitations within mentioned, be possessed of the premises within mentioned, or any part thereof, to make leases of the whole or any part thereof for any term not exceeding three lives or thirty-one years, provided such lease be made to commence in possession, and that the best improved yearly rent that can be had

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" for the same at the time of making such lease b
" reserved thereby, and that no fine or other considera
" tion shall be taken for or on account of the making
" thereof."

Sir Robert and Anne, by indenture dated 26th August 1779, in consideration of 1,000*l.*, demised t William Sheehy for a term of 999 years, at a rent 20*l.*, the lands of Rosnerelane, and also part of Sprin field, subject to a lease of the latter in 1746 by Jo Fitzmaurice to Isaac Howell for three lives, at the re of 40*l.* 3*s.*; and Sir Robert covenanted for himself a his wife, their heirs, executors, &c., to levy one or m fines unto the said William Sheehy, his executors, & of all the premises thereby demised. The lands includ in this lease were part of the premises comprised in settlement of 25th May 1779. By indenture of le dated 28th October 1779, Sir Robert and Anne, consideration of 2,000*l.*, demised to Roger Sheehy younger the lands of Clonmore, part of the lands the settlement of May 1779, for a term of 999 years a yearly rent of 150*l.*, with permission to Roger Shee his executors, &c., during the continuance of the te to graff, cut, and burn the soil and surface of the la thereby demised, without incurring or being liable any penalty or forfeiture for the same, notwithstandi the several acts to prevent the pernicious practice burning land, and with power to Roger Sheehy to q and surrender the demised premises at the end of ev year of the term, upon giving six months notice i writing. By indenture of lease dated 4th June 178*0*, Sir Robert and Anne, in consideration of 5,780*l.*, demised to Roger Sheehy the elder, portions of the Springfield estate and Gurtaheedy, being (excepting

Gurtaheedy) part of the lands in the settlement of 25th May 1779, subject to the remainder of the terms unexpired of different leases then subsisting, and set out in a schedule annexed to the lease, to hold the same for a term of 999 years, at the yearly rent of 50*l.*, without impeachment for waste, and with power to the lessee, his executors, &c., to cut, fell, and carry away all timber and other trees then growing or which thereafter should grow on the said demised premises, and to graff and burn any part of the said demised premises as often as he or they should think proper, with a covenant on the part of Sir Robert and his wife to levy a fine or fines to Roger Sheehy, his executors, &c., for the effectually confirming the said demise. In the schedule were specified five leases for lives of different portions of the lands as then subsisting, and all executed previous to the settlement in 1779, the rent reserved by the lease being less than the former rents; the leases to the Sheehys containing usual clauses of entry and distress, &c., and a reservation of the royalties. Sir Robert and his wife levied no fine pursuant to the above covenants. Sir Robert, by means of fine taken upon these and other leases, raised 10,208*l.*

By deed, dated 29th April 1780, reciting the settlement of 25th of May 1779, and the power therein to raise not exceeding 20,000*l.* by sale or mortgage, Sir Robert mortgaged to St. John Chinnery the Springfield and Farrihy estates, subject to the leases to the Sheehys, for 6,000*l.* Sir Robert was, in 1780, created Baron Muskerry. By deed, dated the 7th of April 1783, reciting the settlement of 1779, and the mortgage of 1780, Lord Muskerry executed a further mortgage to St. John Chinnery of the Springfield and Farrihy

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estates, subject also to the leases to the Sheehys, for 4,500*l.*

In 1780 Hester Fitzmaurice, her annuity being largely in arrear, filed a bill in chancery against Lord Muskerry, the lessees in the several leases being made parties, praying that those leases might be declared fraudulent and void as against her; and that the amount due to her on her annuity, an account being taken, might be raised by a sale of the lands comprised in the trust term created for securing the said annuity. In 1790 Hester died, whereupon her executor, Lord Westcote, revived her suit, and by amended bill made Sir B. Chinnery, the personal representative and heir at law of St. John Chinnery his brother, a party, and putting in issue the two deeds of mortgage for 6,000*l.* and 4,500*l.* All the defendants, except Lord and Lady Muskerry, answered; and in December 1779 there was decree to account. On 27th of January 1802 the master, by his report, found 10,819*l.* due to Lord Westcote as representative of Hester Fitzmaurice, and 5,000*l.* due to Godley. On the 18th of November 1802 Lord Redesdale, C., on hearing the cause, directed that the sum of 10,819*l.* due to Lord Westcote should be raised by mortgage of the estates, and that the trustees of the term of ninety-nine years securing the annuity should execute mortgages of the remainder of the term to a trustee, to be named by Lord Westcote; and also declared that the several leases to the Sheehys were fraudulent and void as against the said Hester and her trustees, and Lord Westcote; and that the full and fair rents for the estates, discharged from the said leases, ought to have been paid from time to time to the receiver in the cause, and referred it to the master

to set fair rents on the estates comprised in the leases, and take an account of what was due for such rents, after giving credit for the sums paid by the tenants to the receiver; and also declared that in case the tenants should redeem the said mortgage by payment of what should be found due for rents beyond the rent reserved in their respective leases, or by payment from their own money, they should be entitled to stand in the place of Lord Westcote for so much as they should pay beyond the rent received by their respective leases.

Sir Broderick Chinnery in 1784 had, in the name of his brother St. John Chinnery, filed a bill in the Court of Exchequer against Lord and Lady Muskerry to foreclose the mortgages of 29th April 1780 and 7th April 1783, pending which suit St. John died without issue, leaving Sir Broderick his heir at law his executor.

By deed dated 11th December 1802, Lord Westcote, in consideration of 4,000*l.*, assigned to Sir B. Chinnery the sum of 10,819*l.*, and the full benefit of the decree of 18th November 1802, and by indenture of the same date the trustees of the term of ninety-nine years (created by deed in 1779 to secure Hester's annuity), by Lord Westcote's direction, and in pursuance of the decree of 1802, mortgaged the lands comprised in the said term to the said Sir B. Chinnery, his executors, administrators, and assigns.

In 1804 Sir B. Chinnery revived the exchequer suit, and obtained a decree to account; and in 1806 a sum of 20,085*l.* 7*s.* 9½*d.* was reported due to him on the mortgages executed to Sir B. Chinnery, and also 10,819*l.* as assignee of Lord Westcote, and 5,000*l.* were reported due on Godley's mortgage. Godley assigned this charge to Sir B. Chinnery during the same cause.

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In February 1807 there was a decree in the exchequer suit for a sale of Springfield and Farrihy estates, for payment, with interest and costs, of the sum reported due on the footing of the mortgages, subject nevertheless to the debts decreed to Godley and Lord Westcote, and to the remedies for receiving thereof, pursuant to decrees of 1802, and subject to the several leases to the Sheehys.

In 1808 Sir B. Chinnery died, after bequeathing to his two sons the sums due on the several mortgages, and on Lord Westcote's claim, and his will was proved and the suit revived by Alice, his widow and executrix.

Under the decree of 1807 in the exchequer suit, Springfield and Farrihy were put up for sale, subject to Godley's and Lord Westcote's demand, and the leases to the Sheehys. On 8th May 1812, Alice, executrix of Sir B. Chinnery, became purchaser, and the estates were conveyed to her, but the deed of conveyance was executed by the Chief Remembrancer only. Robert Lord Muskerry died in 1818, leaving Anne Lady Muskerry and two sons, John Thomas Deane Lord Muskerry and Mathew Deane, him surviving.

In May 1819 John Thomas Lord Muskerry and Anne Lady Muskerry (his mother) filed the original bill in this cause. But John Thomas Lord Muskerry having died in 1824 without issue, and his mother dying in 1830, Mathew Lord Muskerry (the respondent) by amended bill in 1826 against the widow and children of Sir B. Chinnery, and the representatives of the Sheehys, the lessees, after stating the transactions between Robert Lord Muskerry and Sir B. Chinnery, charged that the said several leases were not authorized by any power in the settlement of 1779; that Lord Muskerry, having raised 10,208*l.* by taking fines upon leases, and also

10,500*l.* by mortgages to St. John Chinnery, had exceeded his powers to charge under the settlement of 1779, which limited him to 20,000*l.*; that such mortgages having been made subject to said fraudulent leases were contrary to the intent and meaning of the power; that the account in the exchequer cause was fraudulent and erroneous, and that if due credits had been given nothing would have been found due in respect of said mortgages; that the decree in the said cause was also erroneous in directing a sale for the payment of a subsequent mortgage, subject to a prior mortgage and other prior incumbrances, without providing for the payment thereof out of the produce of the sale, and likewise impeaching the said decree on other grounds; and prayed that the leases to the Sheehys might be declared not to have been warranted by the leasing power in the settlement of 1779, and fraudulent and void as against the plaintiff (respondent) claiming in remainder under the said settlement; and that the mortgages to St. John Chinnery might be decreed not warranted by any of the powers in said settlement, and void as against plaintiff (respondent); and that the exchequer decrees might be decreed as fraudulently obtained; and for an account of what was due to Alice as representative of Sir B. Chinnery, or Lord Westcote's and Godley's demands, and that in taking such account such sums only should be allowed as Sir B. Chinnery actually and bonâ fide paid as assignee of Lord Westcote and Godley respectively, and in case the said mortgages or either of them should be declared a subsisting lien on said estates, then that an account might be taken of the sums due in respect thereof; and that upon payment of the sums actually and bonâ

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fide paid for the same, the plaintiff might be entitled to redeem the mortgaged premises; and for a reconveyance of the same; and for an account also of the sums received by Sir B. Chinnery or his representatives, or which without wilful default he or they might have received out of the Springfield and Farrihy estates, &c.

The cause was heard before Lord Plunket, C., on the 29th of November 1832; and his Lordship directed a case for the opinion of the Court of Common Pleas upon the following question:—"Whether the leases, "bearing date respectively the 28th day of August "1779, the 28th day of October 1779, and the 14th "day of June 1780, made by Sir Robert Tilson Deane, "who was afterwards created Baron Muskerry, and "Dame Anne his wife, to William Sheehy, Roger Sheehy "the younger, and Roger Sheehy the elder respec-"tively, or any or either and which of the said leases "were or was warranted by any power contained in "the deed bearing date the 25th day of May 1779" all further directions being reserved.

The Court of Common Pleas certified that the leases were not warranted by any power contained in the deed of settlement of 1779.

Alice Chinnery died intestate, after the argument in Common Pleas, leaving her two sons her surviving [illegible]. The cause came on (4th of February 1835) before the Lord Chancellor (Sir E. B. Sugden) for further directions, upon bill, answer, and this certificate.

When the cause was called on the counsel for the plaintiff (respondent) was understood to state to the court that there was an arrangement in progress with respect to the demands arising on the mortgages, in which the counsel on both sides had concurred; [illegible]

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that as the Chinnerys, in whom the mortgages were vested, were lunatics, a reference was necessary, and that a petition had been presented.

The Lord Chancellor referred it to the master to inquire and report whether the proposed compromise would be for the benefit of the lunatics. His Lordship stated his wish to have the assistance of two of the common law judges in deciding the question as to the validity of the leases.

That question came on, 11th February 1835, to be argued before the Lord Chancellor, assisted by the Lords Chief Justice of the Common Pleas and Chief Baron.

In the course of the argument the Lord Chancellor stated that his attention had been withdrawn from the facts of the case from the time it was stated that a compromise had been entered into, and as the bill had been filed to impeach the mortgages and the sale, and as the Chinnerys and Lord Muskerry had agreed to withdraw from the consideration of the court the question as to the validity of the sale, he did not think he had jurisdiction to decide upon the validity of the leases, and that he was now differently placed than he would have been if the proceedings had been continued against all the parties, and wished to hear one counsel of a side, whether in the then state of the pleadings he could decide upon the validity of the leases.

Decree of 12th Feb. 1835.

By the decree as made up, after reciting that the plaintiff had, by his counsel in open court, waived insisting on any relief as sought by his bill in respect of the said final decree of the Court of Exchequer, and the said sale in pursuance thereof, and that it had appeared that under the said decree in the Court of

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Exchequer, the said lands were sold to the purchaser Alice Chinnery, subject to the said indentures of lease of 28th October 1779 and 4th June 1780, it was ordered that the plaintiff's bill should be dismissed with costs as against the defendants the representatives of the lessees of the leases of 28th October 1779 and 4th June 1780 (the lessees who appeared at the hearing), save as to costs incurred in respect of the said proceedings in the Court of Common Pleas, as to which it was declared that all parties should abide their own costs. The said decree of 12th of February was, as the appellant contended, duly enrolled.

Order of 8th May 1835.

On 8th May 1835 the respondent presented his petition to Lord Plunket, Lord Chancellor of Ireland, praying for a rehearing of the cause, whereupon his Lordship was pleased to make an order, without notice to the appellants, that the case should be set down to be reheard.

On the 16th May 1835 the appellants Edward Sheehy and John Sheehy applied to the Lord Chancellor to set aside the order for rehearing, as having been obtained by the suppression of the fact that the decree of 12th February 1835 had been enrolled. Affidavits were filed in support of and against the motion.

Order of 28th May 1835.

On the 28th May 1835, on debate in open court, the Lord Chancellor made the following order: "Whereas "Mr. Warren and others, of counsel with the defen- "dants Edward and John Sheehy, this day moved the "court to set aside the order of rehearing dated the 8th "day of May instant, and also moved for the costs of "the said motion: Upon debate of the matter, and on "reading the said order; the decree of the 12th day of "February 1835; the affidavit of John Walsh, filed the

5th of May 1835; the order in Chinnerys, lunatics, the 5th day of February 1835; the report of the th of April 1835; the affidavit of the plaintiff, filed e 23d of May 1835; the affidavit of William Furng, filed the same day; the affidavit of Theoilus Latouche, filed the same day; the notes on aring of 21st November 1832 and the 12th of ebruary 1835; the general rule of the 31st of arch 1819; the two certificates of the clerk of the lls, dated the 11th day of May 1835; as also the w rule 132; and hearing what was offered by r. Blackburne and others of counsel with the plainf; and Mr. John Walsh, solicitor for defendant, d Mr. William Furlong, solicitor for plaintiff, ended: It is ordered by the right honourable the ord Chancellor of Ireland that the said enrolment opened for the purpose of the rehearing the use."

Order on rehearing, 11th June 1835.

n the 4th June 1835 the cause accordingly came on ehearing, and was further heard on the 6th, 8th, 11th June, before the Lord Chancellor of Ireland, his Lordship pronounced a decree, which states, it appeared to the court that the recital in the e of dismissal that the respondent waived any relief st the exchequer decree and the sale thereunder, rroneously inserted in that decree; and on reading rder of reference, and inasmuch as the reference lepending at the time of pronouncing the decree of issal, and the Chinnerys were present in court ing on their rights, it was ordered that the decree missal should be reversed, and the master's report onfirmed; that the compromise therein set forth be ed into effect. The respondent was declared

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entitled to redeem the mortgages on payment of 24,000 and interest within twelve months; it was further ordered, that the premises be reconveyed discharged of the mortgages, and in default of payment the respondent to be foreclosed; and the respondent was further ordered to release the claims of dower due to Anne Lady Muskerry deceased; and the cause was ordered to stand for further hearing, with liberty to all parties to adopt any defence they might be advised arising out of the said compromise and the decree.

In pursuance of the decree of 11th June 1835 the cause came on to be further heard before his Lordship on the 13th day of July 1835; whereupon his Lordship having proposed that any direction which the counsel for the said defendants Richard Boyle Chinnery, Maria Chinnery, and Louisa Chinnery should require for the purpose of protecting their interest in respect of their having a good and sufficient tenant or tenants of the lands and premises comprised in the several leases in the pleadings mentioned, in the event of the said leases being defeated, be inserted in any decree now to be pronounced; and the counsel for the said defendants Richard Boyle Chinnery, Maria Chinnery, and Louisa Chinnery at the bar declining the same; and "upon "reading the case submitted for the opinion of the "justices of His Majesty's Court of Common Pleas of "Ireland, and the certificate of the learned judges of "the said court, therein setting forth that the said case "had been argued before them by the counsel of the "parties, and that they had considered it, and were of "opinion that the leases in the pleadings mentioned, "bearing date respectively the 26th day of August "1779, the 28th day of October 1779, and the 14th

Final Decree, 13th July 1835.

day of June 1780, made by Sir Robert Tilson Deane, Baronet, afterwards created Lord Muskerry, and Dame Anne his wife, to William Sheehy, Roger Sheehy the younger, and Roger Sheehy the elder respectively, were not warranted by any power contained in the deed of settlement bearing date the 25th day of May 1779; and the said defendants the lessees, Edward Sheehy, John Sheehy, William John Sheehy, Bryan Sheehy a minor, by the said William John Sheehy his father and guardian, Anne Westropp, Thomas Johnston Westropp a minor, by the said Anne Westropp his mother and guardian, by their counsel in open court, declining to accept an offer made by his Lordship to send the said case for the opinion of His Majesty's Court of King's Bench; and upon reading the conditional decree, bearing date the 26th day of April 1832, against the defendants James Keatinge and Henry Singer Keatinge, the orders of the 7th and 15th days of June 1832, and the affidavit of service thereof; it is this day, that is to say, Monday the 13th day of July 1835, ordered, adjudged, and decreed by the right honourable the Lord High Chancellor of Ireland, that the said conditional decree be and the same is hereby made absolute against the said defendants James Keatinge and Henry Singer Keatinge: And it is further ordered, adjudged, and decreed, that the said decree of the 12th day of February 1835 be and the same is hereby reversed; and it is hereby declared that the insertion therein of the waiver by the plaintiff therein recited was not warranted by the facts: And it is hereby further ordered, adjudged, and declared, that the said three several leases in the pleadings

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" and in the said certificate of the Court of Common
" Pleas specified, bearing date respectively the 26th
" day of August 1779, the 28th day of October 177[illegible]
" and the 14th day of June 1780, made by the [illegible]
" Sir Robert Tilson Deane, Baronet, who was aft[illegible]
" wards created Lord Baron Muskerry, and Da[illegible]
" Anne his wife, to William Sheehy, Roger Shee[illegible]
" the younger, and Roger Sheehy the elder resp[illegible]
" tively, are not, nor is any or either of them, va[illegible]
" at law or warranted by any power contained in [illegible]
" deed of settlement of the 25th day of May 1779, [illegible]
" that there is no ground for sustaining any or either [illegible]
" them on equitable principles; and the said le[illegible]
" being invalid at law and not sustainable on equitable
" grounds, it is hereby further ordered, adjudged, and
" declared that the same are void: And accordingly it
" is further ordered, adjudged, and decreed, that the
" three several leases be and they are hereby set aside
" respectively: And it is further ordered, adjudged,
" and decreed, that an injunction do forthwith issue
" to put the plaintiff into possession of the premises
" comprised in the said three several leases respec-
" tively: And it is further ordered, that the said defen-
" dant Mary Bourke, the heiress at law of Thomas
" Lloyd in the said settlement of the 25th May 177[illegible]
" named, be paid her costs of this suit by the plaintiff;
" and that the said defendant John Robert Bourke be
" likewise paid his costs of this suit by the plaintiff:
" And it is further ordered, that the plaintiff and the
" several other parties do abide their own costs respec-
" tively: And it is further ordered, that the deposit
" made by the plaintiff on setting down the cause for
" rehearing be paid back to the said plaintiff's six clerk,

"and accordingly the plaintiff may make up and enrol "a decree as aforesaid, for performance whereof the "process of this court is from time to time to issue "as is in such cases usual."

Statement.

The appellants appealed against the order for rehearing made on the 8th May 1835, the order for opening the enrolment of said decree of the 12th February 1835 made on the 28th May 1835, and the final decree made on the 13th July 1835.

Appellants Argument.

Appellants.—The decree of dismissal of the 12th of February 1835 was duly enrolled; and if so, the Court of Chancery ought not to have made the order of 28th May 1835 for opening the enrolment of the decree of 12th of February 1835, but should have suffered the respondent to have sought redress by appeal to the House of Lords, in case he thought himself aggrieved by the decree of dismissal; the more especially as the respondent had obtained the order of the 8th May 1835 for rehearing the cause without notice to the appellants, by their withholding from the Lord Chancellor all knowledge of the fact of the decree of the dismissal having been duly enrolled.

The respondent having by his counsel in open court withdrawn from the consideration of the court the question whether the sale of the Springfield and Farihy estates to Dame Alice Chinnery, subject to the leases the interest in which had become vested in the appellants, was impeachable or not, he was not in a situation to impeach the validity of the leases. The recital contained in the decree of Lord Chancellor Plunket, "That the recital contained in the said "decree of dismissal of the 12th day of February 1835,

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"stating that the said plaintiff, Mathew Baron Mus-
"kerry, by his counsel in open court, had waived in-
"sisting on any relief, as sought by his bill in respect
"of the final decree pronounced by the Court of
"Exchequer in his bill mentioned, and the sale in
"pursuance thereof was erroneously inserted therein,
"being unfounded in fact, and not warranted by any
"statement or waiver made on the part of the said Lord
"Muskerry," is an averment made without evidence, and contrary to the fact, and contrary to the averment of the decree duly made and signed by the Lord Chancellor, in whose presence and hearing the waiver took place.

The validity of the appellants leases, as against the parties claiming under the settlement of May 1779, is recognized by Lord Redesdale's decree in 1802 and the decree of the Court of Exchequer in 1807; and the lessees are moreover entitled to the benefit of the decree of 1802 in respect of the sums of money which they paid in pursuance of that decree and the agreement of the 16th of May 1803. The leases are warranted by the leasing power contained in the settlement of the 25th of May 1779; and even if the leasing power were ambiguous in its terms in respect of any of the provisions contained in any of the leases, yet the respondent, claiming as a volunteer under the parties who introduced such ambiguous expressions into their deed, ought to be prevented from taking advantage of any such ambiguity, but on the contrary any ambiguity therein ought to be construed in favour of the appellants claiming under lessees who paid large fines and entered into covenants to pay rents equivalent to the value of the land when leased, or such fines and such leases being

in all respects bonâ fide in respect to the lessees, and without any ground for suspicion on their part of the settlement of 25th May 1799 being in any degree impeachable, or the leasing power being insufficient to authorize the leases and the clauses therein contained.

Although the leasing power should be construed as not expressly authorizing the taking of fines on leases, yet inasmuch as there is no express restriction in the settlement against taking such fines, and as there is an express power therein authorizing Sir Robert Tilson Deane to raise or levy by sale or mortgage any sum of money not exceeding 20,000*l.*, the fines should be deemed to be part of the 20,000*l.* raised by sale of so much of the rents as would otherwise have been reserved in the leases, and as in fact the most beneficial way of exercising the power of raising the 20,000*l.* as respects the rights of the persons entitled in remainder; and although Sir Robert Tilson Deane by his subsequent mortgages to St. John Chinnery raised a sum of money, which together with the fines exceeded the 20,000*l.* by a sum of 708*l.*, yet such subsequent dealings with St. John Chinnery could not affect the validity of the previous leases. The lessees and the appellants are claiming under them as purchasers for valuable consideration, without notice of any ground of claim on the part of the respondent, or of those under whom he derives, to impeach the validity of the leases, and are therefore entitled to rely on their title as such purchasers for valuable consideration as against the respondent claiming under the post-nuptial settlement of 25th May 1779. Even if at law the leases should be considered as not authorized by the leasing power, yet the respondent was not entitled to the aid of a court of equity to set aside

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leases bonâ fide made in consideration of large sums of money paid by the lessees, such lessees and their representatives having been suffered to remain in undisturbed enjoyment of the demised premises without any adverse claim for forty years, during which period they had necessarily expended large sums of money in the improvement of the lands, and which leases had been acquiesced in by all parties as due executions of the leasing power in Lord Westcote's cause, in which cause the leases were the subject of discussion before Lord Redesdale, then Lord Chancellor of Ireland, who made a decretal order therein in the year 1802, sustaining the leases against all parties except prior incumbrancers; and the validity of which leases was also subsequently recognized by the Court of Exchequer in the foreclosure cause in the year 1807, and the lands decreed to be sold subject to such leases, under which decree Dame Alice Chinnery had become the purchaser of the lands expressly subject to those leases.

Respondent's Argument.

Respondent.—The course pursued, which the appellants objected to, and the result of the rehearing, could not reasonably be complained of; for the final decree appealed against only brought the cause on the merits back to the position in which it stood upon the certificate of the Court of Common Pleas, finding that the leases were not warranted by any powers in the deed of 1776. Lord Chancellor Sugden ought, before over-ruling that decision, to have directed another case for opinion: And if the appellants stood merely on point of practice it was clear that the question whether the decree had been enrolled or not was so doubtful that the safe course to pursue was for the Lord Chancellor to open the

enrolment, with a view to a rehearing, the affidavits showed that the Master of the Rolls held there had been no enrolment. It appeared that the solicitor for the appellants lodged two engrossments of the decree in the rolls office, the first transmitted by the registrar, and the second by his six clerk; but these were mere transcripts of the decree, made up in the short form as directed by the new rules, which new rules do not apply to enrolment of decrees or alter the practice with respect to enrolments; and all that the deputy keeper of the rolls could certify was, that a parchment copy of the decree, signed by Sir Edward Sugden, Chancellor, had been lodged at the office; thus the decree had not been duly enrolled according to the established practice of the Court. It was at least a doubtful question whether the new rules had changed the practice, and it was, therefore, a fit case in which to exercise the discretionary power of the Court to open the enrolment, and not to suffer the party to be prejudiced by the uncertain state of the practice; because, by reason of the appellants joining as they have done, it is incompetent for them to object to the opening of the enrolment of the said decree.

There was a mistake, in point of fact, as to the relief prayed against, the sale in the exchequer having been waived; the sale was waived and had been waived long before, but the relief against it was never waived. In point of law, though a sale be made subject to impeachable leases, they may be afterwards impeached, especially if the purchaser do not object, as in this instance.

Besides, the decision of the Court of Common Pleas was right, but in any event, ought not to have been over-ruled, (as it was by Sir Edward Sugden's decree,)

Sir Robert Deane of granting leases and of charging the estate with 20,000*l.*

This power of leasing he exercised by granting a lease dated 26th August 1779, which is now vested in the appellants William John Sheehy and Bryan Sheehy; by granting another lease, dated 28th October 1779, now vested in the appellants Edward and John Sheehy; by granting another lease, dated 4th June 1780, now vested in the appellants Ann Westropp and Thomas Johnston Westropp. He also exercised the power of charging the estate by two mortgages to St. John Chinnery, one dated 29th April 1780 for 6,000*l.*, and the other 7th April 1783 for 4,500*l.*

On the 18th November 1802 a decree was made in a suit instituted to compel payment of the arrears of the annuity secured to Hester under the deed of the 29th June 1776, the right to which was then vested in Lord Westcote by mortgage of the estate charge; and it was by that decree declared that the leases were fraudulent and void as against their charge, and that the tenants were to account for the full value from the year 1784, but the tenants were to be at liberty to redeem the charge, and as against the estate to be repaid what they might pay for that purpose either by way of rent or sums advanced by them. This suit was instituted in 1782, and soon afterwards, that is, in 1784, Chinnery the mortgagee filed a bill in the Exchequer to foreclose, and in 1787 a decree was made merely of reference to take the accounts, and soon after the decree in the chancery suit, that is, in December 1802, Lord Westcote assigned to Chinnery the mortgagee all his interest under the decree of the 18th November

On the 19th February 1807 a decree of foreclosure was made in the Exchequer suit, upon the report of the deputy remembrancer, who found a large sum due upon Chinnery's mortgage, but subject to the decree in Chancery of November 1802, and to the leases, and to another mortgage of 5,000*l.* then vested in Godley, but which was afterwards assigned to Chinnery the plaintiff. Under this decree a sale of the Springfield and Farnhy estates took place before the remembrancer, and Alice Chinnery, in whom the mortgage was then vested, became the purchaser, but subject, according to the decree, to Lord Westcote's charge, Godley's mortgage, and the leases.

In 1812 a conveyance was directed to be made under their purchase, but it was not executed except by the deputy remembrancer. In 1819 a bill was filed in the Court of Chancery in Ireland by the respondent, the first tenant in tail, and the other parties then interested under the settlement of 1779, impeaching the title of the mortgagees and of the lessees. In 1832 the cause came to be heard before Lord Plunket, who directed a case for the opinion of the Court of Common Pleas as to whether the leases were warranted by the power. In February 1834 the certificate of the Common Pleas was obtained, finding that the leases were not warranted by the power contained in the settlement of the 25th May 1779.

Before the cause came on for hearing upon this certificate, an arrangement having taken place between the plaintiff, the now respondent, and the Chinnerys, in whom the mortgages and Lord Westcote's charge were then vested, the Court was informed that no judgment was required as between the plaintiff and the mortgagees;

upon which Sir Edward Sugden, then Lord Chancellor of Ireland, expressed his opinion that the plaintiff having waived all relief against the mortgagees, and as to the sale in the Exchequer suit, no judgment could be pronounced as to the leases, and therefore dismissed the bill as against the defendants claiming the several leases. Before this time, that is on the 5th February 1835, one of the parties interested in the mortgages being a lunatic, a reference was made to inquire whether the proposed arrangement would be for the benefit of the lunatic; and after the decree, that is on the 8th April 1835, the master reported in the affirmative. This decree, according to the case made by the defendants, was enrolled, but that is denied by the plaintiff.

On the 8th May 1835 an order for rehearing was made as of course; and on the 28th May 1835, upon an application by the appellants to discharge the order for rehearing, an order was made to open the enrolment for the purpose of the rehearing.

On the 13th July 1835 Lord Plunket pronounced his decree upon the rehearing, carrying into effect the terms of the arrangement giving to the plaintiff the benefit of the redemption in payment of the sum agreed to be paid upon account of the mortgages and charges, and as against the lessees declaring the leases void, they having declined to take another case for the opinion of the King's Bench.

The appeal is against the order of the 8th May 1835 for a rehearing, the order of the 28th May 1835 opening the enrolment, and the final decree of the 13th July 1835. The two first may be considered together, the question as to both being the regularity and propriety of the order for rehearing, that is whether

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under the circumstances the Court was precluded by the enrolment from rehearing the cause.

It appears from the affidavit of Mr. Furlong that it was a subject of doubt whether there had been in fact any enrolment of the decree; the deputy keeper of the rolls having objected to the engrossments left with him, as being merely copies of the decree in the short form, and that he had, therefore, consulted the Master of the Rolls, who was of opinion that they were not to be considered as an enrolment, and therefore he declined to give any certificate of the enrolment, and, in fact, there was not any such certificate. Mr. Furlong, the plaintiff's solicitor, having received this information, explained the reason of his not having made any application to the Court to vacate the enrolment; but it appears that the defendants, Edward and John Sheehy, moved to set aside the order for a rehearing upon the ground of the decree having been enrolled, whereupon Lord Plunket ordered that the enrolment should be opened, for the purpose of rehearing the cause.

There certainly is a want of regularity in this proceeding, which may perhaps be accounted for by the doubt which appears to have existed as to whether there had in fact been any enrolment; and if the Lord Chancellor was of opinion that under the circumstances there had been no enrolment, or that there was doubt about it, or that if the enrolment were good there was sufficient ground for vacating it, he may have thought it right to remove the doubt by his order of the 28th May 1835. The question, however, now is, whether it be necessary to dispose of this appeal upon the ground of this irregularity, and after all the expense and delay which has been experienced to send the parties back to

mence their proceedings de novo, so far as to make ecessary for the present respondent to appeal against decree of the 12th February 1835, instead of de- ng any of the questions between the parties upon appellants appeal against the decree of the 13th July 5.

court of appeal is always unwilling to adopt such urse when it is possible to reach any of the merits he case. In questions respecting the enrolment of ees, the court exercises a discretionary power, and ough such discretion ought to be regulated by prece- t and authority, yet the circumstances of this case e very peculiar, and I think that your Lordships not consider it to be your duty upon this question orm to refuse to entertain the other points in the se.

f then your Lordships feel at liberty to consider the its of the decree of dismissal of the 12th February 5, it is material to consider that the decree contains its recitals the grounds upon which it was founded. recites that the plaintiff had by his counsel in open rt waived insisting on any relief in respect to the l decree in the exchequer and the sale made in suance thereof, and that it appeared that the lands l been sold subject to the leases. It proceeds then to miss the bill against the lessees with costs. It is un- cessary to consider whether, if these recitals in the ree of the plaintiff having waived insisting on any lief in respect to the decree of the exchequer, and the le made in pursuance thereof, were consistent with the ct, it would necessarily lead to a dismissal of the bill gainst the lessees, because it appears to me evident om the proceedings independently of the affidavits,

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that the recital must have been inserted from a misapprehension. It is indeed stated in one of the affidavits that it was introduced after the hearing, and this is not contradicted, but upon a rehearing there can be no reason for binding the plaintiff by this evident mistake by the officer of the court. The whole transaction proves that the plaintiff's counsel could not have done what the decree recites, because the arrangement with the Chinnerys was to be carried into effect by a decree. The proposal was, that the defendant should submit to a decree, and a reference had been obtained to inquire on behalf of one of them, who was a lunatic, whether it would be for the benefit of such lunatic to submit to the proposed decree. Now, from the terms of the recital, it would be inferred that the plaintiff had waived all relief against the decree and sale in the exchequer. Whereas in fact the defendant had at the time agreed, subject to the inquiry, to submit to a decree in the plaintiff's favour. This having been so arranged the counsel might naturally have informed the court that the plaintiff had not to trouble the court to adjudicate as against the Chinnerys, but not because the relief against them had been abandoned, but because the terms of it had been arranged, and this no doubt led to the mistake.

If this had been rightly understood at the time, I cannot think there would have been a decree of dismissal without any decision upon the merits. A decree so arranged with the Chinnerys must have had the same effect as if the Court had pronounced it, with this difference only, that the lessees might themselves have disputed the plaintiff's title to any interest in the estate. It was not competent for any of the defendants at the

ng to insist that the relief prayed against the nerys and against the lessees had been improperly l in one suit; and if not, and if the plaintiffs hown a good title to relief against the Chinnerys, ad so established an interest sufficient to entitle o dispute the validity of the leases, the Court not have declined to adjudicate upon the t.

was indeed contended, that independently of this o question the leases, there was sufficient interest n the plaintiff, notwithstanding the sale in the quer, to entitle him to ask a decree to set aside ases, the sale having been subject to the leases, so nothing more was disposed of than what remained e estate, after deducting the interests comprised in ases; so that so much of such interest as had not effectually given to the lessees, not belonging to the s and not having been sold, remained undisposed the original decree, that it is not necessary to give pinion upon that point, because if the plaintiff had uity to set aside the decree in the exchequer and le had in pursuance thereof, or if these proceedings in themselves defective, his title to raise the question cting the leases cannot be disputed, and I have atisfaction to find from the printed report that dward Sugden entirely concurs in this view of se, and gives it as his decided opinion that the was not in its original joinder multifarious, but he plaintiff, disputing the title of the mortgagees r the decree in the exchequer and the sale, was clearly ed in the same suit to raise his objection to the . If then he was so entitled to assert in one suit quity as against the decree and sale, and also

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against the lessee, he must have been entitled in that suit to relief as to both, if he succeeded in making out his case. Suppose at the hearing he had made out his case so far as to set aside the decree and sale in the exchequer, or to prove that they were defective and void, and that he was, therefore, still entitled to the equity of redemption, he would, no doubt, in that case have been entitled to ask of the court a decision as to the leases, and this right could not properly depend upon the greater or less degree of resistance which the mortgagees might make to the plaintiff's title to relief as against them. If, at the hearing, they had by their counsel said that they could not resist the plaintiff's title to redeem, the hearing, as against them, would have been closed, and the title as to the lessees would alone have remained for decision; but this is, in fact, what was done,—the terms upon which the plaintiff was to have his decree against the mortgagees had been the subject of negociation, but the groundwork of the whole was that the plaintiff should have a decree for redemption against them, nor could the defendants, the lessees, be in any degree prejudiced by this, for, notwithstanding this arrangement, it was quite competent for them, and it necessarily formed part of their case, that the plaintiff had no title to question the leases, not having in him sufficient estate and interest to enable him to do so. For this purpose it was part of their case to insist that by the decree in the exchequer, and the sale had in pursuance of it, the plaintiff had lost that estate and interest which was necessary to enable him to question the leases, and this was as much open to them after the arrangement with the mortgagees as before it took place, for if the lessees could show that before that arrangement

the plaintiff had not any such estate and interest, his acquiring the estate and interest of the mortgagees, even before the hearing, would not have improved his situation, but, in fact, he had it not at that time. If, as seems to have been understood at the time, the plaintiff had consented to the mortgagees keeping the estate under the sale, the plaintiff's position as between himself and the lessees would, no doubt, have been materially altered; but as the arrangement was that he should redeem the mortgages, I think that he was as much entitled to a judgment against the lessees, according to the merits, as if he had proved his title to redeem adversely against the mortgagees.

Possibly the lessees may have relied upon the mortgagees fighting that part of the case which turned upon the want of title in the plaintiff, but as it was undoubtedly competent for the lessees to have done that themselves, they cannot complain if a decree has passed against them from their having omitted to insist upon a point in the case which was open to them.

It appears to me, therefore, that your Lordships must come to the conclusion that the grounds for the dismissal in February 1835 cannot be maintained; if that be so, it appears to me that there is the greatest difficulty in your Lordships proceeding any further in adjudicating upon the question between the parties,—I mean so as to pronounce any judgment upon the leases,—as to which the case stands thus: there has been no adjudication below upon that subject; there is the certificate of the Common Pleas against the leases; there was an argument in February 1835 before the Lord Chancellor of Ireland, assisted by the Chief Justice of the Common Pleas and the Chief Baron, but no judgment was

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pronounced upon it, the Lord Chancellor having been of opinion that the suit must be dismissed upon the point of form already observed upon. He, indeed, expressed a strong opinion in favour of the lessees, but carefully guarded against any inference that he was deciding upon their validity. When the cause came on again before Lord Plunket the lessee declined taking any other case for the opinion of the Court of King's Bench, and Lord Plunket made his decree setting the leases aside.

After the opinion of one court of law has been obtained upon a case, if the equity judge entertains doubts as to the opinion returned, or thinks the case of so much difficulty and importance as to require further consideration, it is almost of course to send it for the opinion of another court; it is certainly not necessary so to do, as the judge in equity may take upon himself to decide against the opinion of the court of law, but clearly the parties cannot require him so to do, or complain of his declining to decide the question without further assistance. If, therefore, the parties against whose case the judges have certified decline the offer of the court to have another case sent to another court, they cannot complain of the judge acting upon the opinion already obtained, and in an ordinary case I should not think your Lordships would be exercising a sound discretion if you were to open the door to further litigation on behalf of a party who had declined to accept the offer of the court below, to put the case in the ordinary course for final adjudication.

But there certainly are great peculiarities in the present case; what had taken place in the cause may naturally have led the lessees to think they had a good

nd for getting rid of the suit, without referring title to further question, which ground they must abandoned had they accepted the offer of a second

I do, therefore, think, that it would be hard and t lead to injustice if we were to bind them by their al to accept that offer, particularly in a case in h there has been such a conflict of opinions upon point of law, and I am the more inclined to think ecause I do not see in the last decree any such iries and reservations of right, as it would seem the es would be entitled to before their leases could be en away; for instance, I find that in the decree 1802 they are ordered to account from 1784 to the ty entitled to the arrears of the annuity, without rence to the amount which has been given upon the es. Now, before that can constitute a part of the in of the Chinnerys, the lessees have a right to erve those payments against the estate, and to stand the place of that party for what excess of rent y might so pay or what they might themselves nce. What was done upon this does not appear n the appeal papers, but it is obvious that a con-rable demand may have arisen in favour of the ees from the provisions of that decree, but the decree July 1835 simply declares the leases void, and pro-ls to put the plaintiff into possession.

Now, it is very possible that these and other points y have been overlooked in the contest which was ng on as to the principal matters in issue, and this ords another reason to induce this House not to empt finally to settle the decree between the parties. is, however, quite sufficient, that as to the question as the validity of the leases there has been no judgment

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below, except the last decree, which proceeds upon the lessees refusal to accept the offer of another case, and which, for the reasons I have given, I think ought not to bind them. I think, therefore, that for the purpose of obtaining such an adjudication the case must be sent back to the Court of Chancery in Ireland; that court will of course use its own discretion as to the manner of disposing of that question, that is, whether by deciding it itself or calling for further assistance from another court of law. My object is, that this question should come before the court relieved from the difficulties with which it has hitherto been embarrassed, and this, I think, will be attained by this House declaring that it was competent for the Lord Chancellor of Ireland, at the time of making the decree of the 12th February 1835, to adjudicate between the plaintiff and the defendants the lessees as to the validity of the leases, and, therefore, to remit the case to that court to be heard upon that question, and to make such decree between the plaintiff and such lessees as shall be just.

It is true, that if the lessees should adhere to the course they followed below of declining another case, and if they require no inquiries as to advances made by the lessees, expense might be saved by your now dealing with the case upon that ground; but unless I am so informed I shall not suppose that to be the case. I therefore move your Lordships that the case be remitted to the Court of Chancery in Ireland with the declaration and direction proposed.

The House of Lords declared, That it was competent for the Lord Chancellor of Ireland, at the time of making the decree of 12th of February 1835, to adjudicate between the plaintiff and the defendants, the lessees, in the said suit in the

Court below, as to the validity of the said leases: And it is ordered, That with this declaration the cause be remitted back to the Court of Chancery in Ireland, to be heard upon that question, and to make such decree between the said plaintiff and the said defendants the lessees as shall be just, and consistent with this judgment.

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D. S. BOCKETT—J. P. BEAVAN, Solicitors.

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(Appeal from the Court of Session, Scotland.)

JOHN BOYLE GRAY[1], Appellant.

(No. 16.) [*Knight Bruce—Hill.*]

The Rev[d] JOHN FORBES and others (Outer Kirk Session of the High Church of Glasgow), Respondents.

[*Tinney—John Stuart.*]

Trust—Contract—Burgh.—(1.) Where funds were vested in the magistrates and council of a burgh as trustees to apply the yearly produce in the support and maintenance from time to time of "schools" taught on the Madras system, and the town council entered into agreement with the several kirk sessions in the burgh, binding themselves and their successors to pay over the dividends equally among the kirk sessions, each of the latter becoming bound to lodge annually with the council a vidimus, "showing definitely that the dividend was "to be strictly applied in the promotion of the system "of education proposed by the donor, and accompanied "by an obligation by the kirk session to apply the same "accordingly," and so long as each kirk session did so, "and satisfied the town council" that the contract was duly performed, it should have right to its share of the dividend, and not otherwise, provision being made for admitting members of the town council to the annual examination of the schools "to satisfy themselves of the "bonâ fide and legitimate application of the dividend,"

[1] 15 D., B., & M., 628.

contract bearing that this was done strictly in
' the deed of donation; The town council of a
:nt year having refused to implement the con-
Held (affirming the judgment of the Court
on) that the contract was strictly within the
ncy of the magistrates and town council as
and that the performance of such contract was
on all parties.
'ing been determined by the House of Lords[1],
member of the town council might compe-
ppeal against the judgment of the Court of
the appellant was allowed to plead every
1 to the performance of the contract urged in
irt, although the council as a body had ac-
in the judgment appealed against, and had,
her agreement with the kirk sessions, arranged
ils preparatory to the execution of the trust.
sts, including those incurred by respondent in
sfully opposing, on the ground of incompetency,
l, which was afterwards dismissed on the merits,
against the appellant.

1st Division.

Lord Ordinary Fullerton.

' Rev. Dr. Andrew Bell of Egmore, prebendary
legiate church of St. Peter Westminster, by
denture, executed between him and the pro-
:ertain clergymen and professors of St. An-
:ed the 14th day of July 1831, gave and trans-
these parties the two several sums of 60,000*l.*
entum consolidated bank annuities, and 60,000*l.*
:entum reduced bank annuities, on the recital,
: said Dr. Andrew Bell, the author of the
of education called the Madras System, con-
; that the progress of the said system in his
:ountry of Scotland had hitherto been slow

[1] 3 Sh. & M'Lean, 381.

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" and imperfect, and that the greatest boon he could " confer upon that country would be by taking mea- " sures for the more effectual diffusion of the said " system therein;" and, therefore, the trustees were taken bound to divide the stocks or sums into twelve equal parts, and, inter alia, to transfer one twelfth part thereof to the provost, magistrates, and town council of Glasgow; but upon condition, " that the sum so to " be transferred to them should be by them, and their " successors, employed for the founding or maintenance " of a school or schools in that city for the instruction " of children, whether male or female or both, in the " ordinary branches of education, but so that the " tuition at every one of the schools be upon the " system of mutual instruction and moral discipline " exemplified in the Madras schools" and that the magistrates and council " should stand possessed of the " said stock, so to be transferred to it as aforesaid, upon " trust for ever, to apply the interest and dividends " thereof in the support and maintenance, from time " to time, of schools already founded or hereafter to be " founded on the principles of the said Madras system, " such funds either to remain as invested, or to be in- " vested on any government, heritable, or other suffi- " cient securities, as might from time to time be thought " fitting;" and that, before any appropriation or appli- cation of the said stock, they should execute a declara- tion and acknowledgment of acceptance by them of the several trusts declared in the said indenture. The provost, magistrates, and council of Glasgow having accepted the shares of stock upon the terms men- tioned in his said deed, amounting to 9,791*l.* 13*s.* 4*d.*, which was transferred to them upon the 18th day of

November 1831, executed a declaration of trust, binding themselves and their successors in office, in all time to come, upon or for the trust following; viz. "That we "and our successors in office shall for ever apply the "dividends and interest of the foresaid sums, or of the "proceeds thereof, in the support and maintenance, "from time to time, of a school or schools already "founded, or to be founded, in the city of Glasgow, "on the principle of the system of mutual instruction "and moral discipline, as exemplified in the Madras "school, or in what is known by the name of the "Madras System." In October 1833 ten contracts or agreements were executed between a committee representing the magistrates and town council of Glasgow on the one part, and the committees of the ten kirk sessions of Glasgow, as authorized by the said kirk sessions respectively, on the other part, the contract with the pursuers bearing that "it had been agreed between "the said first party and the several kirk sessions of "Glasgow that, in order more extensively and effectually to promote the system of education contemplated and prescribed by the Reverend Dr. Bell, "the annual interest or proceeds of the foresaid two "sums now vested in government securities should be "equally divided among and paid over, half yearly, "to the different kirk sessions, upon their severally "executing the said contracts; therefore the said "second party, as representing one of the kirk sessions, "and, in particular, the pursuers, or some of their "number, as representing the kirk session of the foresaid Outer High Church and parish of Glasgow, and "as taking burden on them for the same, bound and "obliged themselves, and their successors in office, to

"tary of the said first party at least six days previous "notice of the time fixed for that purpose, so that the "said first party, one or more of them, may have an "opportunity of attending the said examination, and becoming satisfied with the bonâ fide and legitimate application of the foresaid annual interest or proceeds; and, particularly, that the same are applied agreeably to the said contracts, and strictly in terms of the deed of donation executed in favour of the said first party by the said Reverend Dr. Bell."

Within a few days after the execution of the several contracts above mentioned a vidimus or statement was lodged by each of the said ten kirk sessions, and particularly by the respondents, to the following effect:—

"In terms of the contract entered into between the lord provost, magistrates, and town council of Glasgow on the one hand, and the session of the outer high church on the other hand, of date the 16th and 28th days of October 1833, the said session hereby undertake that there shall be conducted, under their inspection, a school or schools for teaching English reading, grammar, and religious knowledge, with such other branches of education as may be required, said school or schools to be divided into classes, over each of which a monitor shall preside, and under the "charge of a master or masters appointed by the kirk "session, and for whom they shall be responsible, and "that the sum of at least 50*l.* shall be expended in "instituting and carrying on said school or schools, "during the period of twelve months from this date."

These contracts were approved and ratified by Dr. Bell's trustees.

The new town council, elected under a recent muni-

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cipal act[1] for Scotland, refused performance of contracts thus duly executed, alleging that the same were not in accordance with the trusts under which the funds had come into the hands of their predecessors in office. An action was brought by the respondents, as representing the kirk session of the Outer High Church of Glasgow, founding upon the contracts, and concluding "that although the pursuers have fulfulled their part "of the said contract in every respect, and are still "willing to do so, and although, upon the faith thereof, "they have expended considerable sums of money, "and entered into various engagements, and matters "are not now entire, yet the said magistrates and "council refuse to comply with their part of said "contract, and to pay over to the pursuers the share "of the said dividends or interest, payable to them in "terms thereof; and although the pursuers have "frequently desired and required the said lord pro-"vost, magistrates, and town council of the city of "Glasgow to fulfil their part of the said contract, by "making payment to the pursuers of their said share "of the said dividends, in terms of the said contract, "yet they refuse or delay so to do; therefore the said "lord provost, magistrates, and council of the city of "Glasgow, and the Hon. William Mills, lord provost, "William Gilmour, James Lumsden, John Fleming, "William Craig, and John Small, esqrs., bailies; James "Martin, esq., dean of guild; Archibald M'Lellan, "esq., deacon convener; and Messrs. Hugh Tennent, "John Boyle Gray, &c., as councillors, for themselves "and as representing the burgh and community of

[1] 3 & 4 W. 4. c. 76.

"Glasgow, ought and should be decerned and ordained, "by decree of the lords of our council and session, to "make payment to the pursuers of their proportion, being one tenth part or share of the annual interest, proceeds, or dividends which have already accrued or may hereafter accrue on the foresaid two sums of 4,895*l.* 16*s.* 8*d.*, making together 9,791*l.* 13*s.* 4*d.*, transferred to the said defenders as above mentioned, and that half-yearly, agreeably to and in terms of the contract between them and the said pursuers before narrated, in all time coming, so long as the "pursuers shall fulfil and observe their part of the said "contract," together with interest, penalty, and expenses.

In defence it was pleaded, 1st, that the pursuers had no title to pursue; 2d, that the contract sought to be enforced was invalid and illegal, contained no proper operative obligations capable of being specifically enforced against either party, and ultra vires of the defenders predecessors, as trustees under Dr. Bell's trust, and still more of any committee of their number, to enter into, or at all events to enter into so as to tie up the hands of the successors. The sound construction and the true intent and meaning of the trust was, that "the corporation of the provost, magistrates, and "town council" should, from time to time, and according to what they might themselves deem expedient and proper under every change of circumstances, at their own discretion, in their own judgment, and on their own responsibility, direct the application of the trust funds, and conduct the whole administration and management of the trust, so as might best answer for the time the ends and purposes of the truster;

(Signed) JOHN FULLERTON."

e.—Whatever may be the peculiarity of the itution of the kirk session of the Outer High h of Glasgow, and of the other kirk sessions of ity, the Lord Ordinary has no doubt that the ers of that kirk session, being the parties with the alleged contract was entered into, have a to insist in the present action, seeking to enforce But, upon the merits, the Lord Ordinary thinks ction cannot be sustained.

the deed of indenture entered into between the Dr. Bell and the persons who may be called his al trustees, the magistrates and town council appointed trustees for the special purpose of ishing or maintaining schools on the Madras n in the city of Glasgow. The words of the are very general, and the Lord Ordinary thinks hese trustees had full power to bind themselves heir successors in office, in all contracts entered n the execution or furtherance of the objects of ust; accordingly, it rather appears to him that tract, binding themselves to pay annually the , or any part of the dividends or interest, under management to the pursuers or any public

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" parties invested with the management of an existing " school, they could, at a comparatively small annual " expense, have permanently secured the conducting " of that school on the Madras system, such transaction " would have evidently been a fair and most advan- " tageous act of administration. But the agreement " libelled is one of a very different kind; the kirk " session of the Outer High Church and the other kirk " sessions have no powers to undertake such an obli- " gation, nor do they profess to undertake it by the " alleged contract forming the ground of the present " action; while, on the one hand, the magistrates and " town council irrevocably bind themselves to make over, " all time coming, the whole dividends and interests, " in certain proportions, to the kirk sessions of the city " of Glasgow, the pursuers, and those other kirk " sessions, only undertake to furnish annually a " 'vidimus,' showing that those shares of the dividends " or interests are to be 'applied in the promotion " 'of the system of education proposed by the donor, " 'Dr. Bell,' which vidimus shall contain an obligation " binding them to apply such annual payments accord- " ingly. And the only consequence of their failure to " furnish that 'vidimus,' and to satisfy the other party " of the same having been carried into effect is, that " the kirk sessions or kirk session that fails shall forfeit " their right under the contract, and that the magis- " trates and council shall be entitled to apply the funds " so forfeited as if the said contract never had been " entered into.

" The Lord Ordinary cannot hold this to be a " contract; the only obligation on the pursuers and " the other kirk sessions is to apply funds, to be

'annually placed in their hands, 'in the promotion of '' the system of education proposed by the donor,' " being just the general obligation imposed by the " trust; and, in this particular, the pursuers do not " disguise that they claim a very considerable latitude, " for they fairly state in their condescendence, that it " is neither required in the contract or the vidimus " that a school or schools should be established in each ' parish; in short, they assert under the transaction a permanent right to a certain share of the trust revenue, under the single obligation of applying it to the purposes of the trust, and that only so long as they choose to undertake the duty. It appears to the Lord Ordinary that this is not a contract, in the proper sense of the term, but truly a delegation of the powers of the corporation, a substitution of ten trusts, to be vested in the ten kirk sessions of the city of Glasgow, for that single trust established by Dr. Bell. Whether or not the attempted transaction might not secure a more beneficial employment of the fund is a different question, but that question has been determined by the truster himself, whose will must, in this particular, be the law.

" Holding this opinion, the Lord Ordinary thinks the general conclusion to the action, that a particular proportion of the annual dividends shall be paid to the pursuers in all time coming, cannot be sustained. But there may be a question, whether the pursuers, if they have maintained a school on the Madras system since the agreement was entered into, ' may not be entitled to some reimbursement for any ' expense thence incurred, out of the annual interests " or dividends fallen due since the date of the agree-

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" ment, and now in the hands of the defenders; and
" as that question has been hitherto little if at all
" touched upon by the parties, the Lord Ordinary has
" directed the case to be enrolled for further argument
" on that point, before finally disposing of the cause."

The respondents reclaimed on the merits, as did also the appellant and the other trustees, in so far as the interlocutor repelled the objection to the title of the respondents to pursue. The Lords of the First Division pronounced the following interlocutor (21st Feb. 1837):

Judgment of Court, 21st Feb. 1837.

" The Lords having advised this reclaiming note, and
" the reclaiming note for the defenders, refuse the
" reclaiming note for the defenders, and adhere to the
" interlocutor reclaimed against in so far as it repels
" the objection to the title of the pursuers; quoad ultra,
" alter the said interlocutors, and find the agreement
" libelled between the pursuers and defenders is in due
" conformity with the trust deed of the late Dr. Bell,
" and a valid and effectual agreement, and therefore
" decern against the defenders in terms of the con-
" clusions of the libel: Find the defenders liable to
" the pursuers in expenses, and remit the account
" thereof, when lodged, to the auditor of court to tax
" the same and report, with this declaration, that no
" part of the expense of this litigation shall form a
" charge on the trust funds of Dr. Bell."

The details of the future arrangement of the funds were in consequence of this decision arranged, and a compromise was effected to the satisfaction of the members of the magistracy and town council, with the exception of Mr. John Boyle Gray, who appealed.

The petition of appeal having been presented and intimated in common form, an application was made by

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petition, on the part of the respondents, praying that the appeal should be dismissed. The reasons relied upon were in substance that the appellant being only an individual trustee was not entitled to act against the vote of the council, or appeal against proceedings which it was alleged had been taken against the council in their corporate capacity only. The House of Lords ordered that the question of competency should be argued in cases; such pleadings were accordingly prepared and laid before their Lordships. After having considered these cases, and heard counsel, the House of Lords pronounced the following order:—"Die "Jovis, 16° Augusti 1838.—Gray v. Forbes.—Respon- "dent's petition to dismiss appeal as incompetent con- "sidered, and respondent's petition dismissed, and the "appeal sustained. Costs to be reserved until the "hearing of the appeal."[1]

The cause having come on for hearing on the merits:—

Appellant's Argument.

Appellant.—The former argument on the competency was resumed, to the effect of showing the title as well as interest of Mr. Gray to resist the performance of a contract which he deemed illegal, and in the illegality of which he, as a councillor, would be implicated.

On the merits it was contended, that in terms of the trust deed, and deed of acceptance thereof, the trustees are themselves bound to exercise the whole powers, rights, and duties entrusted to them; therefore, they could not legally and validly devolve upon or delegate

[1] 3 Sh. & M'Lean, 381.

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to others those rights, powers, and duties, in anywise to restrain or fetter themselves; and, consequently, any such devolution, delegation, or restraint in the exercise of them was invalid and illegal.

In no case had the appellant discovered even an approach to that construction of discretionary powers for which the respondents contend. In the case of Hill and others v. Burns and others [1], decided by the House of Lords on the 4th of April 1826, the doctrine of discretionary power and the relative authorities were fully considered. Where powers of distribution amongst a certain class of persons not precisely described are conferred upon trustees, they have a discretionary power of distributing among such persons and in such a manner as they shall deem most in accordance with the implied will of the truster. This was held to be the import of the case of Dick v. Fergusson [2], 22d January 1758; of that of J. Wharrie v. the distant relations of Edward Wharrie [3], 16th July 1760; and of that of the trustees of John Burn v. his relations, 3d August 1762; and was rendered effective in the case of Hill and others v. Burns and others. In those cases discretionary powers to that extent were held to have been conferred; and the principle was sound, because necessary for explicating the will of the granter. But neither in those cases nor in any other were discretionary powers in the management of details held to confer a right to devolve or delegate the trust. A trust can no more be delegated in Scotland than it can in England; and this is not a trust the execution of

[1] 2 Shaw and Wilson's Appeal Cases, p. 80.
[2] Mor. 7446. [3] Mor. 6599. [4] Mor. 2318.

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which can be performed by any parties except those expressly appointed by the deed. It is no answer that the court can control the trustees, for that is but an imperfect remedy. The true question is, what the donor intended; and in the consideration of that question it is to be borne in mind that the larger the powers it is less likely he meant that they should be devolved on others.

Assuming the contract to have been executed by parties invested with sufficient powers, the rights, powers, and duties of the trustees were devolved upon and delegated by them to the kirk sessions, whereby they ceased to be the administrators; or by the alleged contract, if valid and binding, they did so fetter and restrain themselves as to cease to have the rights, powers, and duties confided to them by the granter.

Farther, the magistracy presumed to act as a body corporate; if they are not so, then they have no power to bind their successors.[1]

The respondents counsel were not called on.

Ld. Chancellor's Speech.

The LORD CHANCELLOR moved, That the interlocutor be affirmed, with costs; stating, that if the appellant be right, that he has such an interest in the fund as to dispute the judgment, he cannot object to being made a party; and if properly a party he is properly made liable with the others. Upon the merits it was clear that the judgment of the Court was well founded. Although the appellant's right to appeal had been sustained, yet he had been recommended to consider of the propriety of pressing his appeal further on the merits;

[1] Pollock v. Turnbull, 5 Sh. 195. 199.

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and he was clearly wrong on the merits of his appeal. The interlocutor appealed from ought to be affirmed, with costs, including the respondents costs of discussing the competency of this appeal.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal (which costs are to include the costs incurred by the said respondents in the matter of their petition touching the competency of the appeal, which last-mentioned petition was heard at the bar by one counsel of a side on the 12th day of March 1838, and considered on the 16th day of August 1838, and was dismissed, but the question of costs thereupon was reserved until the hearing of the said appeal), the amount of the said costs to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

ARCHIBALD GRAHAME — SPOTTISWOODE & ROBERTSON, Solicitors.

[13*th June* 1839.]

(Appeal from the Court of Session, Scotland.)

JOHN FLEMING, Appellant.[1] (No. 17.)
[*Lord Advocate* (*Rutherfurd*)—*Hill*]

HENRY DUNLOP, Respondent.
[*Knight Bruce—Pemberton—James Anderson.*]

Burgh — *Stat.* 3 & 4 *W.* 4. *c.* 76. (*Scotch Municipal Act*) — ***Process.*** — An application for suspension and interdict having been made by a party alleging that he had been duly elected provost of a burgh, and founding upon the minutes of election as his title to the possession of the office, and stating that he was molested by a party also claiming to have been elected provost, and who alone was called as a respondent, or was sought to be interdicted; and the bill of suspension having been passed by the Inner House on report of the Lord Ordinary on the bills, — Held (reversing the interlocutor of the Inner House deciding in the Bill Chamber), That, as the validity of the election of the provost could not, under the statute 3 & 4 W. 4. c. 76., be tried by summary application in which the two claimants were alone made parties, the suspension and interdict was incompetent.

Question raised, but not determined, as to the party who (under certain circumstances) was entitled to preside at the election of a provost, and, in case of an equality of votes, to exercise the right of giving a casting vote.

Appeal — *Stat.* 48 *G.* 3. *c.* 151. — Held, that an interlocutor, passing a bill for letters of suspension pronounced by the Inner House upon report of the Lord Ordinary on the bills, is not an interim order, and may be competently appealed against, even although the suspender has expede the letters of suspension before intimation of such appeal.

[1] Fac. Coll. 16th Dec. 1837; 16 D., B., & M., 254.

2D DIVISION.

Lord Cuninghame, Ordinary on Bills.

BY the statute 3 & 4 W. 4. c. 76., intituled "An act "to alter and amend the laws for the election of the "magistrates and councils of the royal burghs in Scot- "land," it is enacted, by section 1. that thenceforth the right of electing the town council in such burghs shall be vested in a certain class of the inhabitants possessing a particular qualification, being the same which entitles inhabitants in burghs to vote for a member of parliament under the statute 2 & 3 W. 4. c. 65.

By section 15. it is enacted, "that upon the first "Tuesday of November in every year the electors in "such burghs shall in like manner, viz. the burghs "contained in the said schedule C." (which includes Glasgow), "in their several wards or districts, and the "other burghs, at their general meetings, assemble "and elect, in manner herein-before prescribed, in "relation to the first election under this act, one third "part, or nearly as may be one third part, of the "council of such burghs, in the place of the thir "thereof who shall, as herein-after directed, go ou "nually out of office."

By section 16. it is enacted, "that upon the fir "Tuesday in November in the year 1834, and "every succeeding year, one third, or a number "near as may be to one third, of the whole council "each such burgh shall go out of office; and in the se "year 1834, the third who shall go out shall consist "the councillors who had the smallest number of vo "at the election of councillors in this present ye "and in the succeeding year, 1835, the third of "councillors first elected under this act who shall "out shall consist of the councillors who, at such f "election under this act, had the next smallest numb

"of votes (the majority of the council always determining, where the votes for any such persons shall have been equal, who shall be the persons to retire); and thereafter the third of the councillors so annually going out of office shall always consist of the councillors who have been longest in office; provided always, that any councillors so going out of office shall be capable of being immediately re-elected."

By section 17., which relates to the election of magistrates upon the first election of councillors under the statute, viz. in November 1833, it is enacted, "that the councillors of all such burghs not contained in schedule F. to this act annexed," (which schedule contains only some small burghs, and not the city of Glasgow,) "respectively so elected, and accepting, shall, upon the third lawful day after the election of the whole number of such councillors in the present year, assemble in the town hall, or other usual public place of meeting within such burgh, and shall there, by a plurality of voices, (the councillor who had the greatest number of votes at the election of councillors having a casting or double vote in case of equality,) elect from among their own number a provost or chief magistrate, the number of bailies fixed by the set or usage of such burgh, a treasurer or other usual and ordinary office-bearers now existing in the council, by the set or usage of each such burgh; and shall also elect the managers of any charitable or public institution existing in or connected with such burghs," &c.

By section 18. it is enacted, "that (with and under the exception herein-after enacted, viz. of certain

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" small burghs,) upon the completion of the first elec-
" tions of councillors, magistrates, and office-bearers to
" be made in all the royal burghs of Scotland under
" the provisions of this act, and not sooner, the provost,
" magistrates, and office bearers, and other councillors
" now in office, shall go out, and their whole powers,
" duties, and functions shall cease and determine,
" except only where any of the said persons shall
" have been again elected under the provisions of this
" act."

By section 24. it is enacted, " that when any magis-
" trate or office-bearer (other than the provost or chief
" magistrate and treasurer) shall be in the third of the
" council going out of office, the place of such magis-
" trate or office-bearer shall be supplied by election
" by the council as soon as the full number thereof
" shall have been completed by the annual election of
" the third then hereby directed to take place; the
" said election to be made by plurality of voices, and
" the chief or senior attending magistrate to have a
" double or casting voting vote in case of equality:
" provided always, that the provost or chief magistrate
" and the treasurer shall always remain in office for the
" period of three years, and that they, as well as all
" the other magistrates or office-bearers, shall at all
" times be capable of being re-elected."

By section 25. it is provided, " that if any vacancy
" shall in the course of the year occur in the council or
" magistracy or office-bearers of any such burgh, by
" death, disability, or resignation, the same shall be
" filled up, ad interim, by the remaining members of
" the council, by election, as herein-before provided,

"at a meeting to be called on five days notice by the "town clerk, by intimation in writing to each of such "remaining members of council." But this interim election is only to last till the end of the current year in which it is made.

By section 31. it is enacted, "that the magistrates "and council and office-bearers to be elected under "the provisions of this act shall in all respects stand "in relation to the administration of the affairs and "property of such burghs, or of property under the "care and management of such burghs, in the same "situation in which the magistrates and council and "office-bearers of such burghs did stand previous to "the passing of this act; and the magistrates and "council and office-bearers to be elected under the "provisions of this act shall have such and the like "jurisdiction, and the same rights and powers of ad-"ministration of the property and affairs of the burgh, "and of making all usual and necessary appointments, "as heretofore lawfully belonged to and was exercised "by their predecessors in office, any thing in the set, "usage, or custom of any burgh to the contrary not-"withstanding."

By section 36. it was declared, "that all laws, sta-"tutes, and usages now in force respecting the royal "burghs in that part of Great Britain called Scotland "shall be and the same are hereby repealed, in so far "as they are inconsistent or at variance with the pro-"visions of this act, but in all other respects the same "shall remain in full force and effect." Under its former constitution the town council of Glasgow consisted of thirty-two members, and now consists of that number,

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including the dean of guild and deacon convener ex officio, the two last being elected by the merchants house and trades house.

At the first municipal election under the statute, in November 1833, Mr. Robert Graham was elected provost by the council then chosen. In consequence of his resignation in the following year, Mr. William Mills was chosen provost on 7th of November 1834, an office which by virtue of the statute, sec. 24., he continued to hold for the period of three years. Upon the first Tuesday of November 1837, that is to say, on the 7th of November of that year, the election of councillors for the different wards to supply the places of the ten members or third of the council going out of office as councillors, of whom Mr. Mills was one, took place; and Mr. Mills having been put in nomination, though for a different ward from what he had formerly sat in council for, was again elected.

On the 8th of November a meeting of the town council was held, at which the poll books were opened, and the result of the elections of new councillors declared. At this meeting Mr. Mills attended, and claimed right to preside and act in the declaration of the election of the new councillors, in virtue of his continuing to hold the office of provost till his successor in that office should be appointed. The right to preside at the same meeting was also claimed by Mr. Henry Paul, who held the office of first bailie (being the office next in seniority in the magistracy to that of provost), and who was not of the third of the council who had that year gone out of office. The parties acted, however, by the following opinion of Mr. Reddie, legal assessor for Glasgow:—

" OPINION as to the person who is to cast up the " votes, and declare upon whom the election " has fallen, on Wednesday the 8th November " 1837.

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" I am of opinion that, by the 16th section of the " burgh reform act, Mr. Mills goes out of office as " councillor this year, as being one of the third of the " councillors who have been longest in office. But I " am of opinion that the election of councillors is not " completed till the declaration on Wednesday; and " that by the 24th section Mr. Mills is authorized on " Wednesday to cast up the votes, and declare upon " whom the election has fallen. As Mr. Mills, how- " ever, is a candidate this year for the office of coun- " cillor, I am of opinion he is not legally entitled to " ascertain and declare the election where he himself " is a party, namely for the third ward, and, in these " circumstances, I would recommend that Mr. Mills " and Mr. Paul should both be present at the casting up " of the votes and the declaration of the councillors " elected. This is the course which I originally " advised, and I still think it the best calculated to " prevent all ground of objection to the validity of the " proceeding.

(Signed) " JA. REDDIE."

" 7th November 1837."

Accordingly Mills and Paul mutually presided, a protest being taken against the former acting.

On the 9th of November 1837 another meeting of council took place for the induction of the new councillors, at which Bailie Paul presided and administered the oaths to the new members, of whom Mr. Mills was one.

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On the 10th of November 1837 the council met for the purpose of electing from among their own number a provost and other office-bearers. The minutes of this meeting of council, as authenticated and recorded in the books of council, bear that Mr. Mills stated, that being advised that he was entitled to take the chair, he would occupy it at the present meeting.

Mr. Paul stated that it was his right to preside at the present meeting, and that as Mr. Reddie's opinion was taken on the subject, he moved that it should now be read and engrossed in the minutes, which was accordingly done, and is in these terms:

"OPINION with regard to the proceedings at the "election of the lord provost and magistrates on "Friday, 10th November 1837.

"I am of opinion that, although the 24th section of the "burgh reform act may authorize the individual elected "provost to remain a third year in office without any "new election as councillor, and after he must other-"wise have retired from the council, this clause does not "authorize such individual to preside at and vote in the "election of his successor at the meeting of council di-"rected to be held for that purpose. For such a construc-"tion of this clause would increase, by one, the number "of electors of the provost and magistrates, namely, the "number of the members of council entitled to vote at "this meeting, from thirty-two to thirty-three, and "would thus be inconsistent with and contrary to the "fundamental law of the constitution of the burgh, "which limits the number of councillors to thirty-two.

"By the 17th section the election of the provost and "magistrates is vested solely in the members of council; "and by the 4th section provision is made for the

retirement of the provost who has been three years in office and ceased to be a member of council, by the direction that the election is to be made by plurality of voices, and the chief or senior attending magistrate to have a double or casting vote in case of equality.

"A certain curriculum in office is fixed by the enactment that a third of the council shall retire every year; and the clause providing that the provost and treasurer shall always continue three years in office must have reference, for the due extrication of the other provisions of the act, to this statutory curriculum, which, according to the opinion I have already given, I conceive terminates at latest with the act of declaration of the election of the new councillors.

"Nor does the circumstance of the individual who has been provost for three years being again elected a member of council make any difference; for such a re-election is merely an accidental event, which may or may not happen, and cannot, consistently with sound legal principle, be held to affect the general and permanent construction of the statute.

"Upon these grounds I am of opinion that Bailie Paul, as senior magistrate, is legally entitled to preside at the meeting on Friday first for the election of provost and magistrates.

(Signed) "JAMES REDDIE."

"8th November 1837."

The foregoing opinion having been read, Mr. Mills ated that he would, notwithstanding, occupy the chair, id protested that he had a right to do so. Mr. Paul ewise insisted upon his right to occupy the chair, id protested that he had the only legal right to do so.

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Both parties continued in the chairs originally occupied by them.

Bailie Paul moved that Bailie Dunlop should be elected provost; Mr. Johnston moved that Bailie Fleming should be elected lord provost; and the vote being put upon the two candidates, who had been duly seconded, fifteen members of council voted for Bailie Dunlop, and fifteen voted for Bailie Fleming, and Bailie Dunlop and Bailie Fleming both declined to vote. There being thus an equality of votes, Mr. Mills declared that he gave his casting vote for Bailie Fleming, and Bailie Paul declared he gave his casting vote for Bailie Dunlop. Thereupon Mr. Mills declared that Bailie Fleming was duly elected lord provost, and Bailie Paul declared that Bailie Dunlop was duly elected lord provost. Whereupon (after protests by the supporters of both candidates) Mr. Mills administered to Bailie Fleming the oaths of allegiance and abjuration, and Bailie Fleming subscribed the same, with the assurance. Mr. Mills also administered to Bailie Fleming the oath de fideli administratione officii. Bailie Paul administered to Bailie Dunlop the oaths of allegiance and abjuration, and Bailie Dunlop subscribed the same, with the assurance. Bailie Paul also administered to Bailie Dunlop the oath de fideli administratione officii; and the minutes of the meeting for election were respectively signed by Wm. Mills and Henry Paul. The other magistrates and office-bearers were thereupon appointed. The minutes also bear that Mills hung the chain and badge of office round Fleming's shoulders, and presented him with the seal usually worn by the provost. A meeting of council was held on the 16th November, at which both Dunlop and Fleming claimed

the office of provost, and both signed the minutes of the meeting.

On the 17th November 1837 Dunlop presented a bill of suspension and interdict to the Lord Ordinary on the bills, wherein, after stating that he had in virtue of the statute been duly elected provost, and was in the actual exercise of the duties of the office, he set forth, that "notwithstanding of the election having thus fallen "upon the complainer, he is nevertheless molested, "and threatened to be molested, by the interference of "Mr. Fleming claiming the office of lord provost for "himself in respect of the pretended casting vote "attempted to be given by Mr. Mills at the meeting "in question, and this, it will be observed, in the face "of a clear opinion to the contrary, delivered by the "legal assessor for the city, and read at the meeting "of council. It is manifest that this state of things "may be productive of the greatest inconvenience and "prejudice to the affairs of the city of Glasgow, as "well as to the administration of justice in that burgh: "and the complainer now applies to your Lordships in "the present summary form, as one which is undoubt-"edly competent, for protecting him in his rights;" and concluding, "Herefore, and for other reasons to be "proponed at discussing hereof, the said attempted or "threatened molestation of the complainer in his office "of lord provost aforesaid, on the part of the said "John Fleming, and the said attempted or threatened "usurpation of the said office of lord provost by the "said John Fleming, ought and should be simpliciter "suspended; and the said John Fleming ought and "should be prohibited, interdicted, and discharged "from molesting the complainer in the dignity and

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" functions of the said office, and from usurping or " claiming and pretending to the same on his own " behalf.

Statement.

" Herefore I beseech your Lordships for letters of " suspension and interdict in the premises, with or " without caution, in common form; and your Lord- " ships are craved to grant interim interdict until the " case be finally disposed of. According to justice," &c.

The Lord Ordinary granted a sist, and appointed answers to be lodged with a view to reporting the case for the opinion of the Inner House, reserving consideration of the interdict till the bill and answers should be advised. The sist was held as intimated on the same day to the agent of Fleming, the only party complained against.

Fleming lodged answers to the bill of suspension, in which he pleaded, (1st,) that the summary application was incompetent, and that the proceedings complained of which affected the validity of the election of magistracy for that year could only be challenged by declarator and reduction, in which the other members of council ought to be made parties defenders; and (2dly,) that even on the minutes of election, as they stood, he, Fleming, had been duly elected provost by means of the casting vote of Mills, who was then provost, and therefore senior magistrate until his successor was appointed.

The Lords of the Second Division sitting in the Bill Chamber having considered the pleadings, and heard argument vivâ voce, pronounced the following interlocutor (16th December 1837): " The Lords having " advised this bill, with the answers and productions, " and heard parties procurators, on report of Lord

Judgment in Bill Chamber, 16th Dec. 1837.

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Statement.

:uninghame, Ordinary, pass the bill, and grant the nterdict as craved."

)n the 20th of December 1837 Dunlop expede his ers of suspension and interdict; and on the 21st of :ember 1837 he caused the same to be served on ming.

'leming, immediately after the interlocutor of the 1 of December was pronounced, presented a pe- n of appeal. That petition was presented on the 1 December 1837, when an order was made by the se of Lords on the respondent to lodge an answer he petition. Notice of that order was, on the December 1837, served on the respondent Dunlop. 1 the appeal committee Dunlop objected to the petency of this appeal against an interlocutor in Bill Chamber passing the bill, which objection was rved till the hearing.

Appellant's Argument.

ppellant.—1. (In answer to respondent's objection he competency of appeal.) Before the stat. 48 Geo. 3. 51. every interlocutor might be appealed, which productive of inconvenience, and was remedied by act; and although interim interlocutors cannot be appealed, is this interlocutor to be held as an rim or interlocutory judgment? It certainly cannot. he interlocutor had been a refusal of the bill of ension it would have been final, and ex concessis alable; and why not equally so where the right of adverse party was as conclusively determined by judgment? In this process of suspension in the Chamber the suspender asks for letters of suspen-, and the passing of the bill is a judicial authority he granting of letters of suspension, which form the

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commencement of a new process in the Court of Session distinct from the process which depended in the Bill Chamber in regard to the passing of the bill. The judgment pronounced by the Court assisting the Lord Ordinary in the Bill Chamber cannot, in the process upon the bill praying for letters, be reviewed by the Court; so in that respect it is final. The suspender may then commence a new process upon expeding the letters. This appeal does not bring up the process ensuing upon the letters, but only the process on the bill upon which every step has been taken that could competently have been taken. See Young v. Dewar, 17th Nov. 1814[1], Lord Meadowbank's opinion in that case, referring to Scott v. Brodie, 2d March 1803[2]; so that the House of Lords is in a sufficient condition to decide upon the merits.

2. (As to the incompetency of suspension and interdict.) The incompetency of suspension in trying the validity of the election of a town councillor since the late statute took effect had been all but decided by the House of Lords in the case of Monteith v. M'Gavin[3], where the Lord Chancellor had expressed (p. 313) doubts which the appellant now adopted as satisfactory grounds for a reversal.

In the election of a provost the whole merits and validity of the election of the magistracy for the year was involved. Previous to the statute 3 & 4 Will. 4. c. 76. a summary mode of trying all such questions affecting the election of magistrates and councillors individually or collectively had existed under authority of the statute 7 Geo. 2. c. 16., which, in the absence of

[1] Fac. Coll. [2] 3 Shaw and Maclean, 290.

by common law remedy introduced the form of petition and complaint, which accordingly had been acted in where an action of reduction or declarator had not been necessary. It had been determined by the Court of Session (Thomson v. Magistrates of Wick [1], 8th July 1836), that since the late act the summary process of petition and complaint was incompetent; hence there being no other summary mode of application at common law, parties were necessarily driven to the mode of determining such questions by an ordinary action of declarator or reduction in the Court of Session. The cases quoted establish this distinction, that where a question of right to an office is in dispute a declarator is necessary, and that suspension and interdict is the proper form for complaining of any interference or molestation in the exercise of an office, the right to which does not require to be declared.[2] There is no case on which the respondent can found. He cannot now found on that of M'Gavin. He cannot maintain that there has been induction into office, to the effect of holding that the merits of the election of a provost are not in dispute. There being two candidates in the field, both eligible, both on the face of the minutes appearing to have been, and both claiming to have been, elected, while the point of law on which the election turns remains to be determined, clearly there is a controverted election, or at least no such election

[1] 14 D., B., & M., 1118.

[2] Buckney and others v. Ferrier, 10th March 1753, Mor. 1854; Donaldson v. Magistrates of Kinghorn, 29th July 1789, Mor. 1892; Orr v. Vallance, 2d Dec. 1831, 10 S. & D. 93; Watson v. Commissioners of Police of Glasgow, 10th March 1832, Fac. Coll.; Drysdale v. Magistrates of Kirkaldy, 10th June 1825, 4 S. & D. 658; Abbey, 3d Dec. 1825, 4 S. & D. 266.

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as to warrant the respondent in claiming summary protection against molestation in an office of which he is indisputably the legal holder. But the question of right cannot now be tried summarily; and certainly not without the other councillors as proper parties to defend their own acts, and see the validity of the election determined on.

3. (Assuming that suspension and interdict is competent, the appellant was duly elected). Each of the two candidates had fifteen votes, including Mills, who voted for Fleming, and Paul who voted for Dunlop. Either Mills or Paul was entitled to preside, and in that character to have a double or casting vote. Mills was clearly the party so entitled under the 18th and other sections of the act as holding the office of provost till his successor in that office was appointed. His councillorship ended on the 7th; but that was not decisive of the question, as a provost once elected continued so for three years, even though the period of his councillorship might have terminated a year before (as was Mills's own case). The sound view of the terminus ad quem was the official year, terminating with the appointment of the provost's successor, and thus perpetuity of succession instead of discontinuance would be in that office upheld, but which would not be the case upon either of the two more uncertain theories of the respondent; viz., that the year consisting of twelve calendar months, and concluding in this instance upon the 7th of November, or the year terminating always upon the first Tuesday of November, was to be the rule in demitting office. The principle of perpetuity is recognized in England in corporations, and so churchwardens continue in office till their successors are

ppointed. At all rates Bailie Paul could not have he casting vote, because, the bailies being elected early, his career of office had closed.

Respondent's Argument.

Respondent.—1. (As to incompetency of appeal.) A re question of interim possession had been decided. e proceedings in the suspension take place in the chamber; and all that was then obtained by the gment appealed from was a warrant for letters which bled the respondent to bring the other party into rt to try the question at issue. A mere interim er like this ought not to be the subject of appeal; proceedings might in the meantime have been going in court where a different order from that now apled from might have been pronounced, but till ties be duly heard upon a closed record in the susnsion when brought into court, this order remains interim one, which it was the object of the sections and 18 of 48 Geo. 3. c. 151. to prevent being disbed.[1] It is not a judgment that could be pleaded as res licata; Wood v. M'Caul, (12 D., B., & M., 50.); Binny Smith, 26th Jan. 1836, (14 D., B., & M., 355). The antage of the statute in putting an end to appeals inst interim orders is apparent from the circumstance t by this time the question upon the merits might e been finally decided upon the expede letters.

2. (Suspension and interdict competent). The utes show that Dunlop was appointed to that office, d he was in the full exercise of it except in so far as

[1] Ersk. b. iv. tit. 3. s. 18.; Jurid. Styles, "Bill of Suspension," s. 8., 14th June 1799; 6 G. 4. c. 120.; A. S., 19th Dec. 1778; Agnew v. Grierson, 2 Shaw, 377; Macaulay v. Brown, 16th Feb. 1833; 11 S., D., & B., 411.

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molested by the appellant. Suspension and interdict is the proceeding recognized in Scotland as the protective remedy against all wrongful encroachment upon the possession or rights of a party having primâ facie a good title to the property or office held by him.[1] Independently of all remedies from the election statutes, this was the subsisting remedy at common law, to which a party, whether complaining of official or any other molestation, could always have recourse, yet it was seriously maintained that because petition and complaint was no longer competent, the remedial process of suspension was to be excluded. No doubt this remedy is incompetent where applied for at too late a stage of the proceedings, 1 Darling, Prac. 283, and cases there cited. Although the statutes 7 Geo. 2. c. 16. and 16 Geo. 2. c. 11. authorized a process of summary reduction and of petition and complaint against proceedings at elections, no argument is thence deducible either that suspension was superseded or that it had not previously been competent. The introduction of a new legal remedy for specific wrongs does not, unless the statute so provides, extinguish the ancient common law remedies; and so subsequent practice in this particular showed; see Buckney v. Ferrier, 10th March 1753, Mor. 1854; Chalmers v. Magistrates of Edinburgh, 24th July 1782, Mor. 1863; Gray v. Magistrates of Anstruther, 29th June 1819.—Orr v. Vallance, 10 S., D., B., 93, is not adverse, for (1.) the object there was to set aside, at the instance of a minority, a formal election as informal and challengeable, an attempt not

[1] Ersk. b. iv. tit. 3. s. 20.; M'Kenzie, 4 Sh. 1002; Manners and Miller v. King's Printer, 2 Sh. 275, 4 Sh. & D. 559, 3 Wilson & Sh. 268; Siddons v. Ryder, 3 S. & D. 576.

merely to stop, but to rescind; (2.) it was admitted in that case that the party whose place was improperly filled up would have been entitled to this mode of application, and the observations of the judges there ought to be read in reference to the actual circumstances only, and even in Drysdale v. Magistrates of Kircaldy suspension was held to be a proper form of complaining of molestation in the exercise of an office the right to which does not require to be declared; and the same remedy was again acted on, as betwixt two councillors, in Scott v. Magistrates of Edinburgh, 21st Dec. 1838 (1 D., B., & M., N. S., 347). The appellant was the only necessary party, as he alone claimed the office, and against him alone was any interim order required. The other members of council might if they had chosen have sisted themselves in the course of the after proceedings, which could however have been had between the two contending parties for the office in dispute.

3. (The respondent was duly elected to the office in which he is now molested). The difference betwixt the respective claimants for the casting vote consisted in this, that Paul was the senior magistrate present, whereas Mills was not a magistrate, but was then in council as a new councillor, into which office he had de recenti been inducted, Paul also there officiating as senior magistrate. Mills could not have applied to a different ward for re-election except on the footing of his no longer having a seat in the council, and his election for that ward and subsequent induction was the only character in which he could now sit in the council. The argument drawn from the fact that in some burghs parties had been advised to hold fast to

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the office of provost, even after they had ceas
councillors through the lapse of the elective per
disqualification, did not solve the difficulty upo
of parliament, because in the instances last re
there had been no actual demission of office
councillor being provost, and no new electio
ward for which such councillor had sat. Here,
the continuity of office had ceased; and a new
and qualification, by taking oaths, enabled
exercise the duties of the office into which he
so inducted, but could not operate a restorati
office of which he was functus. After th
November, therefore, Mills was a candidate fo
but no longer a member of the council-boar
capacity. The notion of the official year wa
as a remedy to the supposed inconvenience of
in the provostship, which in any view was fo
period at least inevitable. But there was
venience in the respondent's view of the case,
as Bailie Paul (who is admitted on the minu
the senior magistrate) is by law vested with th
of provost or chief magistrate.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this case, v
argued before your Lordships not long since
question of the utmost possible importance, no
as affecting the interests of the parties in conte
litigation, but as respecting the general rule,
not properly laid down, may be extremely p
in the present state of the corporation law in S

It has been considered that the statutory
by the two statutes, the 7th and 16th of G
Second, giving a summary remedy by applicati

Court of Session in questions arising out of municipal elections, does not apply to the system of corporations as now established under the municipal corporation reform act. I think your Lordships will find, that from that circumstance a course is likely to be adopted, which, if not properly regulated, may lead to very serious consequences as affecting these corporations.

The facts of the case which gave rise to the present litigation were simply these:—Upon the election in November 1837, in the corporation of Glasgow, two persons were candidates for the office of Lord Provost; the votes of the council being equal for each, it came to be decided by the casting vote of the presiding officer. It was made a matter of question, whether the Lord Provost who had been in office the three preceding years was the presiding officer; that is, whether he continued Lord Provost up to the 10th November, when the election took place, or whether he had ceased to be Lord Provost upon the 7th of November. If he had ceased to be Lord Provost on the 7th of November, a certain other person would be the senior magistrate. The question therefore was, whether the one or the other had the casting vote; the one voted for the one side, and the other voted for the other; so that the question, who had been elected Lord Provost, turned upon the question, who was the presiding officer at that election. My Lords, there was no possession of the office by either party; each claimed the right of having been properly elected, and there was nothing done upon either side which could be said to put either party in possession of the office. Under these circumstances, one of the parties applied in the bill chamber for an interdict. The Lord Ordinary reported it to the Inner

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House, and the Inner House, upon an application for a suspension and interdict, granted an interdict against one party; and that is the subject of the appeal to your Lordships House. The first question, therefore, raised, independently of the merits of the election, is, whether this be a proper course of proceeding to decide upon the merits of the election under the circumstances which occurred in this case.

Now, in looking back to the authorities upon this subject, it seems to be a statement common to both sides, that there is a very great paucity of authority to be found in the records of proceedings in the Court of Session; and that may be accounted for, no doubt, during the period anterior to the 3 & 4 W. 4. c. 76. when the statutes of George the Second were in force. I find, however, that although there may be but few cases to be found, there seems to be no question as to certain propositions that may be laid down; namely, that a proceeding by suspension and interdict cannot apply against a party in possession of an office; it is equally clear that it is not applicable to proceedings prior to the election, so that, in point of fact, if it be competent at all, it is not necessary to discuss that question. In the present case it can hardly be supposed to apply to any case, except where, from the proceedings at the election, it is a matter of doubt who has been elected, neither party being in possession of the office which is the subject of the election.

But there is ample authority that this mode of proceeding is not the mode of proceeding to decide the question of election in a burgh election at all.

There is another class of cases, indeed, with regard to which the authorities seem consistent, namely, that where there is an undisputed right to an office, and the

party is in possession of the office, it is not incompetent to apply this mode of proceeding for the purpose of protecting the person in possession of the office against an unauthorized intrusion by a mere stranger; but your Lordships, I think, will find that it is confined to cases where the title to the office is so clear and so free from doubt that there is no question to be adjudicated upon as to the title to the office.

I find almost all these propositions laid down, and by all the judges, who all seem to concur in that opinion, in the case of Orr v. Vallance [1], decided in the year 1831. The Lord Justice Clerk in that case says: "I "have a clear opinion that this application is incom- "petent" (viz., an application for suspension and interdict). "I apprehend that there is no point more "thoroughly fixed, than that there is no process for "reviewing proceedings of town councils, filling up a "vacancy, real or supposed, other than by petition and "complaint or reduction;" petition and complaint not applying now to the corporations in Scotland. "Then "what is the nature of this? It is in form, no doubt, a "complaint against the actings of this person, Vallance, "as chief magistrate; but what is put in issue is the "merits of the election by the town council, and we "have the regular minutes of the election as an "appendix to the bill. If we could sustain such appli- "cations under the miserable cover that they are only "against the actings of the man, there would be no "case in which the same sort of argument might not "be used to sanction a bill of this kind instead of a "complaint or reduction, in which it is a fundamental

[1] 10 S., D., & B., 93.

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"principle that the council, one and all, must be called. "I can listen to no such flimsy pretext, and it is not "necessary to enter into the question whether all the "parties are called, for on the incompetency alone I "think the bill must be refused."

Lord Glenlee[1] says: "I am of the same opinion; if "Dods had applied,"—Dods was the party who was unquestionably in possession of the office. Lord Glenlee says, "if Dods had applied, it would have been a "different case; but the complainers have no title in "them, and we must first of all enter into the con- "sideration of the merits of the election, which is "incompetent in the present shape."

Lord Cringletie says: "A bill of suspension would "do against a party having no title or election at all; "but here there is a formal election, which must be "complained of by complaint or reduction."

Lord Meadowbank says: "In the case of Dods "applying there would be no need to inquire into the "merits of the election, and so a bill by him would "have been competent."

Now, it is impossible that any doctrine can be laid down more distinct, or more directly applicable to the present case. They say that that court cannot try the merits of an election in a proceeding by suspension and interdict.

Now, that is supposed to have been interfered with by the case of Watson against the commissioners of police of Glasgow[2], which took place in the following year; but the circumstances of the case are by no means similar. It was not a burgh election, to begin

[1] 10 S., D., & B., 95 [2] Rep. in Fac. Coll. 10th March 1832.

with. The learned judges took a distinction between the two, recognizing to the full extent the doctrine laid down in the case of Orr v. Vallance: The Lord Justice Clerk says, "The case of Vallance is in no "respect parallel to the present, the former referring "to a burgh election, as to which there must be either "a petition and complaint, or a reduction."

At an earlier date than those cases, namely, the year 1825, was the case of Drysdale against the magistrates of Kirkaldy.[1] The facts of that case are not similar to the present; it is only valuable for the doctrine laid down. The report there states, "That where a ques-"tion of right to an office is in dispute, a declarator is "necessary, and that a suspension and interdict is the "proper form for complaining of any interference or "molestation in the exercise of an office, the right to "which does not require to be declared." Up to the time at which it was declared that the summary proceedings under the statutes of George the Second[2] were not applicable to the present state of Scotch burghs, there does not appear to have been any differenee of opinion amongst the learned judges that the question of an election in burghs could not be tried by suspension and interdict.

After it was found that that mode of proceeding was not applicable, it does appear to me that an attempt has been made, or rather a disposition has been manifested, to introduce a mode of proceeding, which was not considered as competent before that time. Now, upon all the cases to which I have referred, nothing can

[1] 4 S. & D. 128. (new ed.)
[2] 7 Geo. 2. c. 16.; 16 Geo. 2. c. 11.

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be more clear than this proposition at least, that where a party was in possession of an office, his title to that office could not be questioned by proceedings of suspension and interdict; that it was necessary to proceed by process of reduction or declarator. There are obvious reasons, to which I shall presently advert, which shew how utterly incompetent a proceeding of suspension and interdict would be to effect the object in view. But I am now referring to it only for the purpose of shewing that, up to the year 1831, no doubt was entertained that suspension and interdict was not applicable to that state of things.

Now, previous to this very election, one of the circumstances which gave rise to the election of Lord Provost was the election of one of the councillors of the name of M'Gavin; and your Lordships will find, by referring to the report of that case, which was argued during the last session, in the third volume of Shaw and Maclean's Reports[1], that M'Gavin was actually elected. He was actually then in possession of his office. Those who questioned his right to be a councilman, depending upon a supposed defect in the list of electors, applied for a process of suspension and interdict. The judges did not act upon that: they thought that under the circumstances, it was not a case in which they ought to grant an interdict, but they sustained the competency of the proceedings; so that in M'Gavin's case they sustained the competency, although the proceeding by suspension and interdict applied to a party actually in possession of his office, which in the three cases I have mentioned were considered by all the judges as a totally

[1] p. 290.

incompetent proceeding for the purpose of questioning the title of a person in possession of an office.

Such is the state of the authorities; now for one moment I call your Lordships attention to the effect of proceeding by the process of suspension and interdict. The result and the only result of it can be to prohibit one party, the party against whom it is directed, from exercising the functions of an office which he either is in possession of, or which he claims the right to exercise; it decides nothing as to the right of election. It may prevent one man from exercising the duties of the office, but it does nothing towards putting any other person in his place: an observation which occurred to me when your Lordships were considering the case of Monteith v. M'Gavin, in July last, and was strongly exemplified by what had then taken place, but had not then been brought under your Lordships consideration.

Now, the only means of trying the right of parties to any office in a corporation must be first of all to try the right of the party in possession, and then by some process to try the right of the party who claims to stand in his place. The proceeding by suspension and interdict may do the one,—it may undoubtedly displace the party in possession, not by depriving him of the office, but by prohibiting him from exercising the functions of the office. It does not declare that any other person ought to be elected in his place, but prohibits the individual from exercising the functions of the office. One, therefore, is not surprized that the learned judges, up to the time when the difficulty arose with respect to the statute [1] of George the Second,

[1] 7 Geo. 2. c. 16.

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considered that the proceeding of suspension and interdict was wholly inapplicable for the purpose of trying the right to an office.

In the present case it is true that the party against whom the process was addressed cannot be considered as in possession of the office; because, a question having arisen as to the mode of election, both parties having claimed to be in possession of the office, in point of law it may be considered that neither of them is actually so. Now, if the learned judges adopted this course of proceeding with the intention of deciding which of the two was really the Lord Provost of Glasgow, then they did that which in the case of Orr v. Vallance, and in the case of Drysdale v. the Magistrates of Kirkaldy, and in the other case of Watson v. the Police Commissioners of Glasgow, to which I have referred, the judges themselves stated distinctly that it was not competent for them to do, upon that proceeding, because it would then be a proceeding to adjudicate upon the merits of an election in a case of suspension and interdict.

But if they proceed upon the ground that this is a mere intrusion by a stranger upon the office of a party properly elected, they could never come to the conclusion without adjudicating that the other party had been first properly elected, and then to treat the other as a stranger intruding. They could not so treat him without considering the merits of the election. It is perfectly clear that they would have first to adjudicate on the merits of the election, and then to treat the other party as a mere intruder. But that applies only where the party is actually in possession; and if one party is not in possession, no more is the other party in possession. I apprehend it is extremely difficult to explain the course that has been adopted

n the supposition that they were acting upon that ch is recognized as a competent mode of proceeding protecting a party actually in possession of an office inst the unauthorized intrusion of a stranger. But on the other hand, they exercised a discretion as the merits of an election, it must have been, in their inion, a matter free from all doubt that the party on whose account they allowed the suspension and erdict was the party duly elected.

Now, it is not my intention in the view I take of case to give any opinion as to the merits of the tion; but to this extent I think your Lordships bound to attend to what took place. It cannot be sidered a matter free from doubt and difficulty, ch of the parties should be held to have been duly ted, the point turning upon the construction of the ; the construction of the act, as it is contended for the present appellant, being that the Lord Provost for time being, who by the act is to remain in posses- n of his office three years, is, according to his con- ction, to go out of his office at the anniversary of day of his election; whereas the argument on the er side is, that he is to remain three municipal rs in the office, and that he shall retain his office his succesor is appointed. There appear difficulties ugh on either side upon considering the different ases of the act, — difficulties, certainly, which the urt of Session can hardly have considered before y came to the conclusion that there was no question all to discuss between the parties; but if there was y question to be discussed between the parties, then ey were adjudicating upon the right of election, and re in a cause of suspension and interdict deciding

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which of these two parties had been properly elected Lord Provost, contrary to all preceding authorities, and contrary to the doctrine which has been acted upon in all the cases to which I have referred.

That is the state of the contest between these parties. The Court of Session have, by an interlocutor upon a bill of suspension and interdict, prohibited the one party from exercising the duties of the office, and put no other party in possession of the office, leaving the town of Glasgow just as much without a Lord Provost by any adjudication of right as it was before.

It was urged at your Lordships bar that great inconvenience would arise from interfering with the interlocutor that has been pronounced, inasmuch as it would leave the parties, and all those interested in the affairs of the corporation, in a state of uncertainty as to who was the Lord Provost. My Lords, it is perfectly true that great inconvenience must arise from this state of things. But in a question which affects all the corporations of Scotland, — in a question, therefore, which it is of the utmost importance to have rightly understood at an early period after the question has arisen, — no inconvenience that may arise to any particular corporation ought to induce your Lordships to take a course that might be productive of mischief to the general administration of the affairs of corporations. My Lords, would no inconvenience arise from sustaining the interdict that has been pronounced? It is admitted that it is no adjudication upon the right to the office; but it is said that if the party had not appealed, and therefore if the process had gone on in the usual course, it was essentially necessary, according to the rules laid down for that purpose, that within

a certain number of days a suit should be instituted. But that suit would only have been a more formal way of calling for the same species of interference by interdict which had been already made by the Lord Ordinary in the Bill Chamber; that would leave the matter just where it was. It is said that the judges might have called upon the parties to adopt proper proceedings, by which a proper adjudication might have been obtained. If your Lordships think that this interdict ought not to stand, it will be competent to either party to adopt those proceedings which may lead to an adjudication upon the question of right; nor am I aware that any time will be saved in coming to a final conclusion as to who is Lord Provost of Glasgow by your Lordships adopting either the one course or the other. I have referred to the principal authorities which have been referred to as impeaching the competency of the proceedings by suspension and interdict. But if this had been a recognized course of proceeding, that is, if the Court had, by means of this summary process of suspension and interdict, the means of deciding questions upon controverted elections without the delay of a regular suit for that purpose, one would be inclined to ask, why was that summary proceeding given by the statute of George the Second? If any summary process already existed, why give that summary process in addition by petition of complaint? Nothing can be more rapid than the proceeding by suspension and interdict; and if it is competent for the judges by that proceeding to adjudicate upon the merits of an election, it could not, in point of rapidity, be improved upon by any other mode of proceeding. It is evident, therefore, that it was not known at that time that there were

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already existing in the Court of Session means of deciding by summary process, and therefore the statute gave a mode of proceeding by petition of complaint.

My Lords, two cases, and two only, have been referred to as interfering with the doctrine laid down by the learned judges in the cases I have referred to, one in the case of Chalmers v. the Magistrates of Edinburgh[1]; but upon examining the case, it does not appear to be a case which can have any influence upon your Lordships judgment in the present case. In the first place, it was not a burgh election at all which, according to the doctrine to which I have adverted of the learned judges, makes a distinction between that and the other cases; nor was it an original application to the Court of Session to interfere with the existing right by suspension and interdict. It was a process of suspension and interdict, it is true; but it was an appeal to the Court of Session from the adjudication of the magistrates of Edinburgh, who had decided upon an election matter subject to their jurisdiction. Therefore, although the proceeding was undoubtedly by suspension and interdict, it is a proceeding of such a nature as prevents it from being an authority in favour of the present proceeding. One cannot but observe even in that case, it was contrary to what is laid down generally as applicable to all cases of proceeding by suspension and interdict, namely, that it was a proceeding against the party actually possessed of the office. It may, therefore, well be a question, if the case was material to the

[1] Mor. 1863.

present purpose, whether that decision would not be liable to be impeached upon the ground of its being a proceeding by interdict against the party actually in possession of the office.

The other case referred to is the case of Gray v. the Magistrates of Anstruther Wester.[1] Now, that is a case which, so far from being applicable to the present, was a case where the proceedings was by petition and complaint; it was not a case of suspension and interdict at all, but by petition and complaint under the statute of George the Second.

My Lords, it may perhaps be found necessary, if the Court of Session has lost the jurisdiction given to it by the statute of George the Second[2], and is incapable of administering justice in the case of controverted elections in burghs in Scotland by summary proceeding,—it may be necessary that the legislature should interfere; it may be necessary that they should have the summary power given to them which they had under the statute of George the Second, and which it appears they have lost, with reference to the existing corporations of Scotland. Whether that ought or ought not to be done is not now the matter for consideration; but the circumstance of their having lost the power under that statute can be no reason why the power should be exercised under a jurisdiction which it appears at the time when the municipal corporation reform act was passed was found incompetent, and over and over again declared to be incompetent, for the purpose of trying elections in burghs in Scotland. My Lords, it would obviously be productive of

[1] Fac. Coll. 29th June 1819. [2] 7 Geo. 2. c. 16.

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the greatest possible inconvenience. It is impossible that justice can be done by this course. It is wholly incompetent to carry into effect that which must be the object of every court in interfering with questions as to the validity of these elections. But then another strong reason against your Lordships sanctioning a proceeding of that character is this:—that there are already modes of proceeding which, although not summary modes of proceeding, are calculated to meet every possible case that can arise. If the party is improperly in possession of an office it is not a matter of dispute that the Court of Session has jurisdiction, by process of reduction, to displace him from that office. If the party be not actually in possession of that office, then there is nothing to reduce. If a question arises, which of two parties is properly elected, then the proceeding by process of declarator is beyond all question competent and suited to the purpose of enabling the Court of Session to adjudicate between the parties, and to say which of the two is to be considered as properly exercising the duties and functions of the office. It is very true that these are not summary proceedings; but it is equally true, as I apprehend, and not disputed on either side at the bar, that coupled with these proceedings, the proceeding by suspension and interdict might very well be applied so that, pending the proceeding in which ultimate adjudication was to take place, the court might in the meantime, by virtue of this process of suspension and interdict, regulate as to the party who should happen to be in possession of the office. Whether that be or not a course of proceeding consistent with the practice of the Court of Session, it is not necessary at present to

consider; it was so represented at the bar, and I find it referred to as the recognized practice in some of the cases to which I have adverted. The present question is, whether it is a wholesome practice that in the present case the Court of Session should proceed by suspension and interdict only.

My Lords, there is another point to which I shall have to call your Lordships attention; but upon the merits of the case, considering that this is a question at least difficult to be decided which of these two parties is properly elected, and therefore a question in which the proceeding by interdict cannot be supported, upon the ground of its being a mere intrusion upon an office, of which some other person is clearly and legally in possession, I should advise your Lordships not to sanction a proceeding which, if acted upon by the Court of Session in Scotland, must obviously lead to very serious consequences.

It has been objected that this appeal is incompetent, because this is not a final adjudication between the parties; and under the statute no appeal lies from the interlocutory order. My Lords, the very general terms used in the statute prohibiting appeals against interlocutory orders no doubt have created considerable difficulty in several cases which have occurred, and it is often matter of difficulty to ascertain whether within the meaning of that act a particular proceeding is to be considered as interlocutory or not. From the best information I have been able to obtain as to the nature of this proceeding, it cannot be considered an interlocutory proceeding. It is a preliminary proceeding, it is true, but it is final as far as that proceeding itself is concerned, the proceeding being by an application

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made ex parte in the first instance to the Lord Ordinary in the Bill Chamber, stating the case and praying for an interdict; it prays that the Lord Ordinary may pass the bill and grant the interdict. If he passes the bill and grants the interdict, as far as the passing the bill is concerned it is merely an authority for a more regular proceeding being commenced; but it is final. He may refuse the bill; and if he refuses the bill nothing further can be done in that proceeding; but the party may apply again to the same or to another Lord Ordinary for letters of suspension and interdict.

In considering whether this is final or not, and whether it is a subject of appeal or not, you must suppose the Lord Ordinary either to decide the one way or the other. Now, suppose he refuses the bill, that may be productive of the greatest possible evil to the parties. But the opinion of the Lord Ordinary is final; that is, he refuses the interdict, because that is the effect of his refusing the bill; and he denies to the party the opportunity of pursuing that remedy at least, though he may adopt some other, or may again apply to the Court for a similar remedy.

It seems hardly necessary to consider this any further, because I find by reference to a case which I believe was referred to in the argument that your Lordships have entertained appeals upon proceedings of this kind. I find in the case of Scott v. Brodie in the year 1803, reported in the Faculty Collection of Decisions, that the Lord Ordinary had passed the bill and granted the interdict. That was the subject of an application to the Court of Session, who sustained the bill, but varied the terms of the interdict; so that there was

order of the Lord Ordinary confirmed, as to the ipal part, by the judges of the Court of Session. interdict was in some degree altered; that was the subject of appeal to your Lordships house.

that was in precisely the same terms as the nt, for all material purposes; for, though here Lord Ordinary did not himself originally exercise isdiction, but reported the case to the Inner e, and the bill was in the first instance passed and nterdict granted by them, yet, it was in that the order of the Court of Session passing the bill granting an interdict that was made the subject of ppeal to your Lordships house. I do not appre-l, therefore, that your Lordships will feel any culty in exercising your jurisdiction in this case, that you will not consider that it is taken away he act of parliament, inasmuch as the proceeding, gh preliminary, is a proceeding complete in itself, therefore it is to all intents and purposes within meaning of the act a final adjudication, upon which appeal will lie to this House upon the provisions be act.

by no means wish to be understood as giving any ion as to whether a jurisdiction exists by suspension interdict in other cases; it is a question of practice ch is much better left to those who are familiar the practice of the Court of Session. But looking he authorities which are to be found in the books, finding this to be a question in which an interdict d not be granted without an adjudication upon merits of the election, and finding that all the es have laid down, in the cases to which I have rred, that it is not competent in proceeding by

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suspension and interdict to adjudicate upon the merits of the election, I think your Lordships will adopt the safest course by not sanctioning a proceeding which may lead to dangerous consequences, and which is contrary to all the authorities to be found in the books; but that your Lordships will adopt a much safer course, by remitting it to the Court of Session to consider what is the best course to be taken in these cases, but not permitting them to interfere with the merits of an election upon a proceeding by suspension and interdict. The best way to effect that object, I submit to your Lordships, will be to reverse the interlocutor passing the bill and granting the interdict which has been pronounced in the Court below.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal be and the same are hereby reversed: And it is further ordered, That the said cause be remitted back to the Court of Session in Scotland, with instructions to refuse the bill of suspension, and to do otherwise therein as may be just, and consistent with this judgment.

ARCHIBALD GRAHAME—DEANS and DUNLOP, Solicitors.

[18*th June* 1839.]

(Writ of Error from the Court of Exchequer, Scotland.)

THOMAS SPEARS (representing Robert Spears deceased), THOMAS SPEARS, and WILLIAM MITCHELL (representing George Douglas Mitchell deceased), Plaintiffs in Error. (No. 18.)

[*Dr. Lushington.—Miller.*]

Sir JOHN ARCHIBALD MURRAY, Her Majesty's Advocate General of Scotland, on behalf of Her Majesty, Defendant in Error.

[*Attorney General (Campbell)—Lord Advocate (Murray)—Kaye.*]

Extent—Assignation in Security.—Two partners of a trading firm executed a trust conveyance of part of their shares in the partnership stock to certain co-obligants in bonds of credit at the bank; under the conditions, first, that before any sale or transfer of the said stock should take place, the trustees should be bound to give three months intimation of their intention to the assignors, and secondly, that the trustees should be bound to apply the proceeds of the stock in paying whatever should be due on the bonds of credit at the time of the sale of the stock. The assignors intimated said assignation, by having the stock transferred in the books of their firm to the names of the assignees. A writ of extent was afterwards issued against the assignors as crown debtors, at which time the value of the stock so assigned was 960*l.* 4*s.* 8*d.*, and the debt due on the bonds of credit was 1,200*l.* Upon scire facias by the Crown against the trust assignees, Held (reversing on error the judgment of the Court of Exchequer in Scotland), That the assignees

had, by virtue of the intimated assignation, a special property in said stock, available against the Crown seizing the stock under an extent against the assignors for a debt due to the Crown.

Baron of Exchequer, Sir P. Murray, Bart.

GEORGE M'LAGAN and Frederick M'Lagan carried on in partnership, under the firm of George M'Lagan & Co., the business of distillers in Scotland. They were also partners in another distillery company, under the firm of Spears, Mitchell, & Co.

A balance was struck on the company books of Spears, Mitchell, & Co. on the 1st of September 1813, when the amount of stock then at the credit of Frederick and George M'Lagan respectively, in the concern of Spears, Mitchell, & Company, was 1,529*l.* 13*s.* $10\frac{3}{19}$*d.*

On the 7th of April 1814 the M'Lagans executed a trust assignation, setting forth "that for certain good "causes and considerations it is proper and expedient "that we should grant the trust right underwritten;" and therefore they assigned, conveyed, and made over to and in favour of certain other partners in the firm of Spears & Co., "but in trust always for behoof of "us and our heirs and successors, and under the "conditions and provisions herein-after specified, a "part of our stock belonging to us in the concern "of Spears & Co., to the extent of 1,200*l.* sterling "each, together with the whole interests, dividends, "profits, &c. that shall arise upon the said share of "the stock of the said company of Spears & Co., to "the extent foresaid, from and after the date hereof, "turning and transferring the whole right of the "premises from us, our heirs, executors, and suc-"cessors, to and in favour of the said R., T., and

Spears, and assignees, whom we hereby sur-
gate and substitute in our full right and place
the premises," with full power to them to
nd dispose of the whole or any part of the said
s of the capital stock of the company of Spears
., to the extent foresaid, with all right compe-
to the assignors, but under the conditions,
) that before any sale or transfer of such stock
ll take place the trustees shall be bound to give
ee months intimation of their intention so to
to the M'Lagans: (2.) declaring always, that
: trustees shall be bound to apply the proceeds
the stock so conveyed in paying and dis-
rging whatever sums shall be due at the time of
sale of the said stock on two bonds of credit
1,000*l.* sterling each, granted and subscribed by
said Robert, Thomas, and Henry Spears, and
id Millie, binding themselves along with us the
F. & G. M'Lagan, one thereof to the Bank of
land, and the other to the Falkirk Banking
pany, to be operated upon by the said company
George M'Lagan & Co.: (3.) during the sub-
nce of the trust to pay the profits to the
agans."

the 11th and 12th of April 1814 the M'Lagans
to the managing partner of Spears & Co.,
ng him to "transfer 1,200*l.* of their stock in the
cern of Spears, Mitchell, & Co. to Robert, Henry,
d Thomas Spears, jointly to be held by them in
ms of trust deed."

n the 16th of May an entry was made in each of
accounts in company of the M'Lagans in the books
Spears, Mitchell, & Co. thus: — "1814, 10th May.

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"To Robert, Henry, and Thomas Spears joint account "fo. 23. 1,200*l.*;" and a joint account was opened in the books of Spears & Co. in the names of Robert, Henry, and Thomas Spears, in which account were the following entries: — "1814, 10th May. By Frederick "M'Lagan's account in company, fo. 5. 1,200*l.* — "1814, 10th May. By George M'Lagan's account in "company, fo. 6. 1,200*l.*

On the 27th March 1816 a writ of extent issued against G. & F. M'Lagan, for excise duties due to the Crown.

By an inquisition under that extent it was found that the firm of Spears & Co. were indebted in the sum of 509*l.* 15*s.* 9*d.* to G. & F. M'Lagan, in respect of their share in the company funds of Spears & Co., which was seized by the sheriff, and claimed by Messrs. Spears. At the trial in the Court of Exchequer it was agreed that the M'Lagans interest in the company funds of Spears & Co. at the time of taking the inquisition was 960*l.* 4*s.* 8*d.*, instead of 509*l.* 15*s.* 9*d.* On the 2d of June 1832 a writ of scire facias was brought by the Advocate General of Scotland on behalf of the Crown, in the Court of Exchequer, to recover this sum. To this writ Messrs. Spears pleaded, that they were not at the time of the teste of the writ of extent, nor at the time of taking the inquisition under the extent, indebted to the M'Lagans in the said sum, and issue was joined. The case came on to be tried before the Court of Exchequer in Scotland, on the 23d May 1834, when the jury returned a special verdict, setting out the foregoing facts; the question thereby raised being whether the Crown was entitled to the 960*l.* 4*s.* 8*d.* as a debt due from Spears, Mitchell, & Co. to the M'Lagans, the

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n debtors, or whether Messrs. Spears were not in ght of that sum, by virtue of their assignation of pril 1814, duly intimated.

is special verdict was argued on the 27th June , when Baron Sir P. Murray directed judgment to tered for the Crown.

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Judgment in Exchequer, 27th June 1834.

ears and others brought a writ of error.

Argument of Plaintiffs in Error.

intiffs in error.—The stock was duly assigned by M'Lagans, who were divested of all right in the . The assignation was expressly granted to secure now represented by the plaintiffs in error against consequences to which they might be subjected by having become bound as obligants in two bonds redit granted by them for the use and benefit of ssignors; and according to the law of Scotland an nation in trust or in security, followed by intima- , is equally available as an absolute assignation he purpose for which it may have been granted; such assignation, from and after the intimation eof, completely divests the assignors of the property ubject conveyed, and transfers the full right thereof he assignees. The assignation was not only inti- ed, but the amount of stock assigned was set apart transferred and appropriated to the assignees in a rate account entered in their names in the books of company, part of whose stock held by the assignors conveyed to those represented by the plaintiffs in r, by such assignation, so that the stock ceased to he property of the M'Lagans, or attachable for their s, until the claims of the assignees thereupon were r satisfied. The Crown upon an extent in aid is tled only to the rights of the Crown debtor in so far

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as available against his debtor, and here, after assignation intimated, the assignors have no right against the assignees.

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Argument of Defendant in Error.

Defendant in error.—The trust assignation of the 7th of April 1814, set out in this special verdict, and upon which the decision of this question depends, was, under the circumstances of this case, inoperative. For one of its conditions was, that no sale or transfer by the trustees of the subjects assigned could take place till three months notice had been given by the trustees to the assignors. At the time when the extent issued no such notice had been given, so that the trustees then had no power to sell, and might never have acquired that power, as the assignors might have discharged their liability to the banks out of their private funds, or have made some other arrangement, without allowing the trustees to resort to their property in the house of Spears & Co.

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LORD CHANCELLOR.—My Lords, in this case Frederick and George M'Lagan, the Crown debtors, carried on the business of distillers, in partnership together, under the firm of M'Lagan & Co., and they were also partners in the firm of Spears, Mitchell, & Co.

By a balance struck in the books of Spears & Co. in September 1813, the amount of stock to the credit of Frederick and George M'Lagan was 1,529*l.* On 7th April 1814, Frederick and George M'Lagan by deed assigned to the other partners in the firm of Spears & Co., part of the stock belonging to them in the firm of Spears, Mitchell, & Co. to the extent of 1,200*l.*, with all the dividends and profits which

should arise therefrom, to the extent aforesaid, upon trust, first, to give three months notice before selling; second, to apply the proceeds in discharge of what should at the time be due upon two bonds, in which Messrs. Spears, partners in the firm of Spears & Co., had joined the M'Lagans as securities for advances made to them by two banks; thirdly, during the subsistence of the trust to pay the profits to the M'Lagans.

On the 11th April the M'Lagans wrote to Spears & Co., desiring that 1,200*l.* of their stock in the firm of Spears, Mitchell, & Co. might be transferred to the account of Messrs. Spears, their co-obligors, which was done, and which was dated on the 10th May 1814. On the 27th March 1816 the writ of extent issued, at which time the share or stock of the M'Lagans in the house of Spears, Mitchell, & Co. was 960*l.*, and at the same time the debt due from the M'Lagans to the banks exceeded the 1,200*l.* These facts were found by the special verdict; and the question upon the writ of error was, whether the Crown was entitled to the 960*l.* as a debt due from Spears, Mitchell, & Co. to the M'Lagans, the Crown debtors, or whether the Spears, the co-obligors, were entitled to that sum under the deed of the 7th April 1814.

The learned baron, Sir Patrick Murray, was of opinion that the Crown was entitled, not upon the ground of any invalidity, under the law of Scotland, of the assignation in trust, but because it was not an absolute but only a conditional assignation, which had not been rendered absolute before the teste of the extent, by notice and actual sale under the provisions of the deed.

I cannot concur in this opinion; the deed was an

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assignment of what was due from the firm of Spears, Mitchell, & Co. to the M'Lagans, or of their interest in the stock of that firm. Due intimation was given, and no question is made as to this having been a valid assignation of the property in question according to the law of Scotland. The 1,200*l.* was actually transferred into the names of the assignees in the books of the firm.

The M'Lagans, therefore, could not have compelled payment of the amount of their share of the stock in that firm without satisfying the terms of the trust of the deed. They had ceased to be creditors for or owners of the full amount of their share in such stock, and had become creditors for or owners of so much only of such stock as might remain after satisfying the trusts of the deed, and that by a valid assignation according to the law of Scotland, two years before the issuing of the extent.

Could the Crown, claiming title to receive what was due to or was the property of the M'Lagans, be entitled to more than they could themselves have demanded? Could the Crown, so claiming, be entitled to seize what had two years before become the property of the plaintiff under the deed, to the extent of their lien thereon? If such were the law it would be most unjust, and it would make it impossible to deal with any one liable to become debtor to the Crown for any assignment of property upon trust, or subject to conditions or otherwise than for an absolute interest. The authorities show that such is not the rule of law as applicable to extents.

In West on Extents, page 116, the rule, as extracted from the authorities quoted, is thus stated: "Goods,

"pawned or pledged before the teste of an extent "cannot be taken, because the pawnee or bailee has a "special property in them. Nor for the same reason "goods demised or lent to another for a term certain "during the term. But it seems that goods pawned "before the teste of the extent may be taken as against "the pawnee, on satisfaction of the pledge, or taken "and sold subject to the pawnee's right." In the King v. Sanderson, (reported in Wightwick, page 53,) the Chief Baron says, the preference of the Crown can only operate upon what the partner himself had.

In the King v. Lee, (reported in 6 Price, page 369,) the goods of the Crown debtor were in the hands of a factor, who had paid bills accepted upon the credit of the goods before the issuing of the extent, and had accepted other bills not due at the time of issuing the extent, judgment was given for the factor, the Chief Baron (Richards), in delivering the judgment of the Court, saying: "The Crown debtor himself could not "have compelled the factors to give up the goods to him "without first paying them what was due. Therefore we "think that the Crown could not compel the factors to "give up their lien without paying them what money "they had advanced on the faith of the consignment to "their principal." The rule upon this subject must be the same in Scotland as in this country; indeed the learned Baron so considers it. The case of Redfearn v. Somervail, in 1 Dow. page 50, shows the title, according to the law of Scotland, of the assignee under an intimated assignation; and the authorities referred to show that the Crown can only claim that which its debtor was entitled to.

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I therefore move your Lordships to give judgment for the plaintiffs in error.

The House of Lords ordered and adjudged, That the judgment given in the said Court of Exchequer in Scotland for the defendant in error be and the same is hereby reversed.

ALEXANDER MUNDELL.—BOWYER, Solicitors.

[18*th June* 1839.]

(Appeal from the Court of Session, Scotland.)

JOHN HART and WILLIAM HODGE, Appellants.[1] (No. 19.)
[*Sir William Follett—A. M'Neill.*]

JOHN FRAME and COMPANY, Respondents.
[*Dr. Lushington.*]

Agent and Client—Reparation.—A country agent was employed by a manufacturing company to prepare petitions, at their instance, to the justices of peace against two apprentices, for having deserted their work, and other misconduct. The agent accordingly prepared and presented petitions, founded on the 4th Geo. 4. c. 34., but libelling the third section, instead of the first which related to apprentices in the situation of those complained of; the apprentices were convicted and imprisoned, but subsequently liberated by the Court of Justiciary in respect of the wrong section having been founded on, and they thereafter sued the company for damages and expenses: Held (affirming the judgment of the Court of Session) that as the terms of the act were clear, the agent was liable in relief, although there was no established course of practice under the statute, and although neither the opposite agents in the inferior court nor the sheriff-substitute of the county considered the petitions to have been erroneously libelled.

2D DIVISION.
Lord Ordinary Jeffrey.

THE appellants are in partnership as writers in the of Paisley, and the respondents are calico manufacs in Glasgow and at Locherbank in the county of

[1] 14 D., B., & M., 914. 922; Fac. Coll. 9th June 1836.

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Renfrew, where their works are situated, having in their employment a great number of apprentices. By the first section of the 4th Geo. 4. c. 34., intituled "An act "to enlarge the power of justices in determining com- "plaints between masters and servants, and between "masters, apprentices, artificers, and others," it is enacted, "that it shall and may be lawful not only "for any master or mistress, but also for his or her "steward, manager, or agent, to make complaint upon oath against any apprentice within the meaning of the "said before recited acts (viz. 20 Geo. 2. c. 19. and "6 Geo. 3. c. 25.) to any justice of the peace of the "county or place where such apprentice shall be em- "ployed, of or for any misdemeanor, misconduct, or ill- "behaviour of any such apprentice; or if such appren- "tice shall have absconded, it shall be lawful for any "justice of the peace of the county or place where such "apprentice shall be found, or where such apprentice "shall have been employed, and any such justice is "hereby empowered, upon complaint thereof made "upon oath by such master, mistress, steward, manager, "or agent, which oath the said justice is hereby "empowered to administer, to issue his warrant for "appprehending every such apprentice; and further "that it shall be lawful for any such justice to hear and "determine the same complaint, and to punish the "offender by abating the whole or any part of his or "her wages, or otherwise by commitment to the house "of correction, there to remain and be held to hard "labour for a reasonable time not exceeding three "months."

By the third section of the statute it is enacted, "that if any servant in husbandry, or any artificer,

" calico printer, handicraftsman, miner, collier, keelman, " pitman, glassman, potter, labourer, or other person, " shall contract with any person or persons whomsoever, " to serve him, her, or them for any time or times what- " soever, or in any other manner, and shall not enter " into or commence his or her service according to his " or her contract (such contract being in writing, and " signed by the contracting parties,) or having entered " into such service, shall absent himself or herself from " his or her service before the term of his or her con- " tract, whether such contract shall be in writing or not " in writing, shall be completed, or neglect to fulfil the " same, or be guilty of any other misconduct or misde- " meanor in the execution thereof, or otherwise respect- " ing the same, then and in every such case it shall and " may be lawful for any such justice of the peace of the " county or place where such servant in husbandry, " artificer, &c., or other person, shall have so contracted, " or be employed, or be found; and such justice is hereby " authorized and empowered, upon complaint thereof " made upon oath to him by the person or persons, or " any of them, with whom such servant in husbandry, " artificer, &c., or other person, shall have so con- " tracted, or by his, her, or their steward, manager, or " agent, which oath such justice is hereby empowered " to administer, to issue his warrant for the apprehend- " ing every such servant in husbandry, artificer, &c., " or other person, and to examine into the nature of " the complaint; and if it shall appear to such justice " that any such servant in husbandry, artificer, &c., " or other person, shall not have fulfilled such contract, " or hath been guilty of any other misconduct or mis- " demeanor as aforesaid, it shall and may be lawful

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" for such justice to commit every such person to the " house of correction, there to remain and be held to " hard labour for a reasonable time, not exceeding " three months, and to abate a proportionable part of " his or her wages, for and during such period as he " or she shall be so confined in the house of correction, " or in lieu thereof, to punish the offender by abating " the whole or any part of his or her wages; or to " discharge such servant in husbandry, artificer, &c, " or other person, from his or her contract, service, or " employment, which discharge shall be given under " the hand and seal of such justice gratis."

The respondents having deemed it necessary, for the safety and protection of themselves and their business, to take proceedings against some of their apprentices, under the above act, employed the appellants to prepare petitions to the justices of the peace for Renfrewshire against two apprentices belonging to the manufactory of the names of Houston and Crookshanks, for having deserted their work, and other misconduct.

These petitions were presented to the justices, and after certain procedure and proof Houston and Crookshanks were convicted, and committed to the house of correction.

Bills of suspension and liberation having been presented to the high court of justiciary by Houston and Crookshanks and two other apprentices named Hunter and Gilmour, who had been convicted and committed to the house of correction upon petitions, at the instance of the respondents, prepared by Mr. James Campbell, writer in Johnston, these convictions were quashed and the prisoners ordered to be liberated. The petitions which had been prepared and presented by

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Mr. Campbell specially libelled on the third section, and the appellants, seeing that a conviction had followed, prepared the petitions against Houston and Crookshanks in similar terms, specially libelling on the same section.

In the course of the proceedings against Hunter and Gilmour, no objection to the petitions, as founded on a wrong section of the statute, had been taken by the agents who appeared on behalf of the apprentices; but in the case of petitions presented against Houston and Crookshanks, in answer to an objection taken, that the petition had been founded on the third section instead of upon the first, the sheriff substitute of Renfrew, acting as a justice of the peace, delivered the following decision:—"As to this objection I should not be disposed to sustain it, at any rate, considering that the provisions of the third section are of general application; but any doubt on that score seems removed by the subsequent statute 10 Geo. 4. c. 52., which has the effect of making all the provisions of the act founded on applicable to apprentices."

Houston and Crookshanks raised separate actions of damages against the respondents on account of the proceedings at their instance, which actions were duly intimated by the respondents to the appellants. After an arrangement the respondents agreed to pay to each of the parties, Houston and Crookshanks, 25*l.*, in the name of damages, and also to pay the taxed expenses of their actions, and these sums were accordingly paid by the respondents, who then brought actions of relief against the appellants.

A special case, comprising the above facts, having been agreed to, the Lord Ordinary, on the 1st of March

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1836, pronounced the following interlocutor and note: —"Finds, that the defenders are bound to relieve the "pursuers of the damages and expenses to which they "have been or may be subjected in consequence of "the illegal and incompetent proceedings which they "instituted and carried on in their names against the "apprentices named in the libel, the illegality and in- "competency of the said proceedings having been "wholly occasioned by the negligence or want of pro- "fessional skill of the said defenders while acting in "the employment of the pursuers, and repels the "defences, and decerns accordingly; but before answer "as to the specific sum for which decreet for execution "should pass against the said defenders, appoints the "cause to be enrolled, that the parties may be farther "heard."—"*Note.* The grounds of this judgment are "substantially the same as explained in a note[1] to an "interlocutor of this date, in the action by the same

[1] *Note.*—"It is certainly with regret, and not without some hesitation, "that the Lord Ordinary gives this judgment. Where there is no sus- "picion of fraud, or reckless disregard of the client's interest, cases of this "kind are always distressing. But, on attending to the whole circum- "stances, he has not found it possible to come to any other conclusion. "In the first place, he must say, that he thinks the blunder, in libelling "on the third section of the statute, instead of the first, was a very pal- "pable and gross blunder. The one section dealt professedly with "apprentices, and with them only; the other with servants, and other "persons hired or engaged to work on special contracts; and being "almost identical with the former in the substance of its enactments, "could not be supposed also to relate to apprentices, without imputing to "the legislature the most absurd and preposterous repetition. But the "whole style and substance of the two sections points out the distinction "in the clearest and plainest manner. The section about apprentices "gives its remedies to the masters or mistresses of such apprentices, and "uses this and no other phrascology throughout. But the section about "servants and persons employed to work never once uses these expres- "sions, and gives its remedies only to 'the person or persons with whom "'such servant, &c. may have contracted, &c.;' and in the fourth section, "which contains regulations common to both classes, the distinction is

igainst James Campbell. The only differ-
.ween the cases is, that Campbell says he

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axiously and carefully preserved; that section setting forth,
masters, mistresses, or employers may sometimes reside at
y which the said apprentices or servants, artificers, &c. may
inconvenience in recovering their wages, certain facilities
rovided, &c. But the very substance of the third section
shown any attentive (even though unprofessional) reader,
d not relate to apprentices, since it speaks exclusively of
se only contract with their employers is a contract to work
l who are contemplated as persons sui juris, and completely
binding themselves by such a contract. Now, the contract
rentice, though it may include a contract to work for hire,
a contract to teach and to learn a certain trade or handi-
being generally entered into with persons under age, is
ariably concluded, not only with them, but with their
other guardians, expressly taking burden for them, as is
ith the indentures referred to, and produced with the
titions by the defender; and yet libelling only on the third
ting to independent contractors, not with a master or mis-
with an employer for him. In these circumstances it is
in the defender to say that the first section related only to
of a particular description, and that he, conceiving that
as intended to reach all descriptions, was therefore induced
as the safest for his purpose. In the first place, it is mani-
e apprentices excluded from the operation of the first section
ntended to be affected by the statute at all, as belonging,
tices to surgeons, attorneys, &c., to a higher class of per-
whose misconduct it was not thought necessary to provide
nary remedies. But, second, whoever might be without
ions of the first section, the defender could not possibly
t the persons he was to prosecute were within it. It ex-
express terms, to all who had not paid an apprentice fee of
wards. But, first, it is a matter of notoriety to every one
that no such fee was ever paid in the trade of calico
nd, second, the defender had the indentures before him,
wed there was no such fee. But strong as this ground is,
Ordinary would have had great difficulty in subjecting the
on it alone, considering the apparent novelty of the pro-
he acquiescence not only of the justices, but of the legal
f the apprentices, and above all, the deliberate opinion of
table sheriff substitute (given, no doubt, after the defender
nitted to the course he had taken) in favour of all that
done. The sanction of still higher opinions proved insuffi-
ed to protect a law agent from the consequences of professional
he cases of Mathie, 17th May 1826, and Stevenson, 6th July
ut still the Lord Ordinary could not have perfectly satisfied

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" deliberately considered the statutes, and came to the " conclusion on which he acted, after using all possible " himself with a judgment resting merely on his own conviction, that a " great, and, in his view, an inconceivable blunder had been committed. " He thinks it right to state, therefore, that he has proceeded chiefly on " a different view,—a view very nearly corresponding with that on which " Lord Lyndhurst appears to have placed his judgment, in affirming the " interlocutor of this Court in the case of Stevenson, (4 W. & S. App. 182.) " already referred to. He there said, that if the agent had been necessarily " constrained to grapple with a nice and difficult point of law or practice, " he might not have been answerable for the consequences; but that the " case was very different, when it appeared that he had a safe and plain course " before him, which he chose to desert, in order to embark on a doubtful " one; and that if he needlessly raised a nice question, when he might " have avoided it, he must answer the consequence of resolving it wrong. " Now, in this case, if the defender really was at a loss which of the two " sections to proceed on, was it not open to him to proceed upon both? " If he actually believed that apprentices (though not once mentioned) " were, or might be included in the third section, and that it was only a " repetition, in more comprehensive terms, of the first, why not make sure " of reaching the parties accused, by referring to both conjunctly, as merely " explicatory and supplementary of each other? Or, if he was aware that " both could not be intended for the same class of persons, and was " doubtful under which his parties were included, what was to hinder " him from founding upon both alternatively, and seeking a conviction " upon the same state of facts against them, as certainly comprehended " under the one or the other description? There is no doubt, it is humbly " conceived, that a libel, in either of these forms, would have been " perfectly relevant, and a conviction obtained under either, liable to no " objection. If the last or alternative form was adopted it would probably " have been necessary for the Court to decide under which section the " parties were to be held as arraigned; and if they, with both before " them, should have fallen into the alleged error of the defender, (which it " is not easy to imagine,) it is, no doubt, possible that the consequences " might have been the same to the pursuers. But the defender would, " at all events, have been saved from responsibility, and been entitled to " say, what he cannot now say, that in a matter of supposed difficulty he " had run upon no needless risks, but followed a course perfectly unex- " ceptionable, and safe for all parties. Nay, if this very plain statute had " appeared to him absolutely inextricable and obscure in all its sections, " there was still a plain and a safe way by which he might have escaped " all possible embarrassment. It is settled by the special case that he " had no instructions to proceed upon that statute at all. His employ- " ment was quite general, 'to prepare petitions to the justices against " 'certain apprentices who had deserted their work, and otherwise mis- " 'conducted themselves.' Now, by the original acts of 1617 and 1661, " as interpreted by immemorial usage, the justices had undoubted power

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ence to be right; while the present defenders hey did not deliberate at all; but having been oyed after Campbell's petition had been received acted upon, merely followed that precedent, and ed of its propriety by its success. Of the two, Lord Ordinary rather thinks this last defence vorst. Even communis error, and a long course cal irregularity, has been found to afford no ection to one qui spondet peritiam artis. But there had been nothing like a course of prac- or any series of precedents which had received tacit sanction of the proper authorities. The nders were in no way bound to submit their ment to Campbell's, and had no right to deprive employers of the benefit of their own skill and city by leaning indolently on his example. If blind will follow the blind they must both lie in same ditch."

Judgment of Court, 9th June 1836.

court (9th June 1836) having adhered to the interlocutor, the present appeal was brought.

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reing all such contracts, without the aid of any recent enact- and the defender might have discharged himself of the task he dertaken without referring to the 4th of Geo. IV. at all. In w it appears to the Lord Ordinary that he stands very much in ation of Stevenson in the question with Rowand; and that, even ing that there could have been any material difficulty in fixing he proper section, it was a difficulty which the defender created own act, and met, consequently, at his own peril, there being a nd safe course open to him, by which, without injury to any one, il might have been avoided. No man of common judgment, ional or unprofessional, can be listened to, who would say, that reading the statute, he thought there was no sort of risk or ty in entirely passing over, or neglecting the first section, — or re was a plain or palpable difficulty, the defender must be nable for the consequences of not taking a plain way to it."

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Appellants Argument.

Appellants.—In the ground of action, as set forth in the special case, upon which the judgment of the Court of Session is founded, there are no facts stated by the respondents relevant to infer a liability against the appellants; it is not alleged that there was any professional negligence in conducting the proceedings, nor is it averred that the petitions were informal, or that there was any neglect, in matter of form, by the appellants, in doing their duty as practitioners before the court; on the contrary, except for the alleged error in law, the proceedings were regular and competent. Neither is it relevant to infer a liability by a law agent or attorney for a debt which he is instructed to recover, or a liability to pay damage arising out of proceedings which he has been instructed to institute, to say that he has been negligent, or has shown want of skill; it must be averred that there was crassa negligentia, that there was gross ignorance, or that there was gross want of skill; and in the present case there are no facts averred which amount to crassa negligentia or gross want of skill.[1]

Although the petitions recite particularly the third section of the statute referred to, yet the statute itself, which is a public statute, was also founded on, as appears from the conclusion of the petition, which bears,—"That in these circumstances it is clear that "the said Thomas Houston junior has contravened "the statute before narrated and founded on; and in "order that he may be brought to punishment for

[1] Pitt v. Yalden, 4 Bur. Rep. 2060; Laidler v. Elliot, 3 Bar. and Cress. 738; Baikie v. Chandless, 3 Camp. 16; Godefroy v. Dalton, 4 Bingham 460; see also M'Lean v. Grant, 15th Nov. 1805, Mor. No. 2, App. voce Reparation.

ɔing, the present application is made to your urs for the usual warrant in such cases."

statute, therefore, is expressly founded on, and a public statute, the judge was bound to take of and give effect to such of the provisions as, iidering the facts proved, he thought applicable; the judgment actually pronounced it does not that the Lord Ordinary placed his decision on rticular part of the act.

correctly stated in his lordship's note, "That had been nothing like a course of practice, or series of precedents, which had received the tacit tion of the proper authorities," and this prin- ught to have led his Lordship to acquit the nts, in place of deciding against them; for even more mechanical branch of the profession of a ent, viz., that of conveyancing, it was laid down House of Lords[1],—"That a solicitor, called upon erform duties in his character as a solicitor, ot to be held responsible for every mistake in t of law which he may commit. Every person is e to mistakes in difficult and doubtful points of ; and if the question had turned solely on the truction of this instrument, I should be of ion that Mr. Stevenson was not liable. But, my ds, the true distinction is this:—In this particular it appears that Mr. Stevenson, without any suffi- t reason, departed from the ordinary and beaten se, from the usual and established forms of con- ncing."

the appellants had no such beaten track,—no

[1] Stevenson v. Rowand, 4 Wilson and Shaw's Rep. 182.

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guide to light their path in construing this recent and complex act. The Lord Ordinary, from the note of his opinion in the relative case of Campbell, seems himself to have been uncertain as to what would have been the safest road. He admits the competency of founding on the first section, but says it might have been founded on jointly with the third; or that the petitions and sections might have been founded on alternatively; or that the statute might have been avoided altogether, and the petition placed on the Scottish statutes 1617 and 1661. The Judges of the Inner House distinctly announced that they did not concur in these views. Indeed there can be no doubt, that if the appellants had followed any of the courses suggested by the Lord Ordinary, the proceedings must have been quashed for uncertainty and inapplicability.

The appellants are country practitioners, who have not immediate access to the best advice, and the offence committed by the apprentices being one requiring an immediate check, and the proceedings very summary in their nature, they are necessarily called on to exercise their judgment under the pressure of obtaining instant redress.

Both the judge to whom the execution of this act is entrusted and the sheriff substitute of the county, and other practitioners engaged in precisely similar cases, and the agents of the parties accused, either directly sanctioned the petitions as being correctly and accurately laid, or acted on the footing that they were so.

In such circumstances it is impossible to maintain that there was, on the part of the appellants, *culpa negligentia*, or gross ignorance and want of skill.

Respondents.—The appellants, as the paid agents the respondents, were responsible for the skill d art necessary to accomplish safely the business ich, as professional men, they undertook. The neral rule as to the party employed in such cases spondet peritiam artis, and imperitia culpæ annu-eratur.

The nature and extent of their employment is dis-ctly set forth in the special case as follows, viz. that e appellants were employed by the respondents "to prepare petitions to the justices of the peace for Renfrewshire, at their instance, against two appren-tices of the names of Houston and Crookshanks, belonging to their manufactory, for having deserted their work, and other misconduct."

As to the form of proceeding no instructions were iven; but the respondents trusted entirely to the ppellants, as their legal advisers, and it was to secure he benefit of such advice that they resorted to the ppellants at all, but having so resorted to them, and aying, of course, the usual professional charges in the atter, they trusted themselves implicitly in the appel-nts hands. The object was, that their refractory prentices should be brought back to a state of bordination, and the respondents knew that the law orded means to this effect; but whether the remedy s a remedy at common law, or whether it was to be nd in the statute book, and if so, in what part of the tute book, the respondents did not know, and gave emselves no concern.

The Lord Ordinary very justly observed, that there s, independently of that statute, "a plain and a safe way by which they (the appellants) might have

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"escaped all possible embarrassment. By the original "acts of 1617 and 1661, as interpreted by immemorial "usage, the justices had undoubted power of enforcing "all such contracts, without the aid of any recent "enactment, and the defender might have discharged "himself of the task he had undertaken without "referring to 4 Geo. 4. at all."

The jurisdiction and powers of the justices independently altogether of the stat. 4 Geo. 4. are undeniable.[1]

It is not doubted that the appellants acted with the most perfect bona fides. But the question here is, whether as between two parties, one of them a professional man, and taking money for his professional aid and assistance, and the other an unprofessional man, resorting to the first, and paying him his utmost charge for a piece of professional business to be performed, and the result having been that matters were not merely blundered to the extent of making the business performed inoperative, but blundered to such an extreme degree as to involve the client in penal damages, as having been guilty of the quasi delict of wrongous imprisonment,—is it the paid agent, or the employer who pays him, upon whom the loss is to fall? Surely it is not asking too much at the hands of a professional man, that he shall at least have sufficient skill not to bring his client into the disgrace and the dangers of a false

[1] Anderson, 24th Jan. 1837, 15 D., B., & M., 412; M'Lellan, 9th July 1825, 4 Shaw and Dunlop, 165; Jack, 11th March 1837, 15 D., B., & M. 833; Dinwoodie, 22d Nov. 1748, Mor. 7638; Bisset, 15th May 1810; Raeburn, 4th June 1824, 3 S. & D. 69; Wright, 9th Feb. 1826, 4 S. & D. 440; Stewart, 21st June 1832 and 21st May 1833, 11 S., D., & B. 628; M'Dougall, 27th June 1833, 11 S., D., & B., 795; Stevenson v. Rowand, 4 W. & S. Appeal Cases, 177; see to the same effect, 2 W. & S. 563; Frame and Son v. Campbell, 14 S. & D. 914.

prisonment; and if he have not such skill, surely here both are equally certantes de damno vitando, it is upon the former, and not upon the latter, that any loss which thence accrues shall be laid.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this was an action in the Court of Session in Scotland by the respondents against the appellants, who are provincial writers or attornies, for damages sustained by the alleged negligence or want of skill of the appellants in the transaction in which they were employed by the respondents. The parties had the good sense to avoid the expense of going into evidence, by agreeing to a statement upon a special case; as to the facts, therefore, there is no question. It is to be observed, that this special case assumes the employment of the appellants by the respondents, and that their instructions were generally to prepare petitions to the justices of the peace against the two apprentices Houstoun and Crookshanks, no special instructions being stated; that these two apprentices and another, Hunter, who had been convicted upon a similar petition, having disputed the legality of the convictions by bills of suspension and liberation, the present appellants acted for the respondents in maintaining the legality of the conviction, but the conviction in Hunter's case having been held illegal, and he having consequently been liberated, no opposition was made to the application by Houston and Crookshanks, and that they were consequently liberated, and having afterwards brought actions for false imprisonment, the respondents, with the concurrence of the appellants, settled those actions by paying to each 25*l.* and their costs. This arrangement, it was agreed, should not prejudice the

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present action, but was to be considered as if the sums had been found due by the verdict of a jury or final judgment. No objection to the form of the proceeding was taken in Houstoun's case, but the objection was taken in Crookshank's case, and over-ruled. Although these proceedings may not be conclusive in this action of the illegality of the imprisonment of the apprentices, yet it is, I think, very difficult for the appellants, in the face of these admissions, to contend that the convictions were legal, and, consequently, that the adjudication of their illegality and the order for the discharge of the apprentices were not well founded, and they admit that it was by their advice, or that of the agent employed by them, that no opposition was made to this adjudication and order; but there is, I think, no doubt of the illegality of the proceedings against the apprentices.

The question, therefore, is reduced to this: Was there such a degree of negligence or ignorance in the conduct of the appellants, in conducting the proceedings against the apprentices, as to subject them to the liability of indemnifying their employers against the injury which has arisen from it? Their instructions were general,—to prepare petitions to the justices of the peace against the apprentices, for having deserted their work, and other misconduct.

It is, I think, unnecessary to inquire what course the appellants, acting under these instructions, ought to have adopted if any serious doubt or difficulty had existed as to the construction of the act of 4 Geo. 4. c. 34., because the recent statute was naturally the authority to be resorted to. It has, however, been well observed, that had the construction been thought doubtful, all danger

miscarriage might have been avoided by founding on the statutes generally, without specifying the par-ılar section; but I cannot discover any ambiguity or bt as to the construction of the act. It recites the Geo. 2. c. 19., 6 Geo. 3. c. 25., and 4 Geo. 4. c. 29. he two first of these statutes, the distinctions between ants and apprentices is very distinctly marked; the : of 6 Geo. 3. c. 25., indeed, is "An act for better egulating apprentices and persons working under ontract," and the 4 Geo. 4. c. 29. extends the pro-ons of the two former acts to apprentices upon se binding-out no larger sum than 25*l.* had been or uld be paid. The 4 Geo. 4. c. 34., reciting this act, which this distinction is so clearly marked, itself intains it in the clearest possible terms: the first tion provides for complaints by a master or mistress inst any apprentice within the meaning of the said ore-recited act; the second section also relates to prentices, giving to them a summary remedy for their ges not exceeding 10*l.*; the third section takes up e case of servants working under contract, and scribes them in this way, "That if any servant in husbandry, or any artificer, calico printer," and then enumerates a great variety of other trades, "or other person shall contract with any person or persons whomsoever to serve him, her, or them for any time or times whatsoever, or in any other manner;" and n it gives summary jurisdiction to the magistrates punish such servants breaking such contract, or g guilty of any misconduct in the execution thereof; fourth section providing a remedy for wages unpaid, n the party to pay is absent, applies to both classes, , therefore, in describing the parties to be paid,

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it repents the description in the third section, but adds to it "and apprentices," and in describing the parties liable to pay it describes them as "masters, mistresses, or employers;" the first evidently applying to the master of apprentices, and the latter to the employer of servants.

The appellants, however, receiving instructions to proceed against two apprentices, wholly neglected the first section, and founded the petition exclusively upon the third section, which they set out in the petition, and then stating the indentures of apprenticeship and that the apprentice had absented himself, and had neglected his service and duty as an apprentice and servant as aforesaid, concludes that he had contravened the statute before narrated and founded on, that is, section third, which did not relate to apprentices at all. From this error, in founding upon the third section instead of the first, the whole evil has arisen; and, as I have observed, the appellants cannot now dispute that evil has been the necessary and legal consequence of error, and that the respondents have therefore exposed to the damages and expenses which they paid to the apprentices. Looking, therefore, to the case against the apprentices, which the appellants directed to conduct, and to the act under which they proceeded, it appears to me to be a case of gross negligence, which term I think more appropriate than ignorance; the appellants case being that they led into the error by following the example of their professional agent of the respondent, who had pursued the same course, and thereby involved them in the same difficulty, and exposed him to the same responsibility. It is obvious that this

as the duty of the appellants to look with their own ; and judge with their own understanding; and if, ad of doing so, they have blindly followed the erro- s course of another they cannot complain at being e responsible for the consequences of the error into h their guide has led them. Their employer had a : to their diligence, their knowledge, and their ; and whether they had not so much of these ities as they were bound to have, or, having it, neg- d to employ it, the law properly makes them liable he loss which has arisen to their employer. Another nd of defence is, that the point having been raised e case of Crookshanks, the justice who heard the was of opinion that section third was the one icable to the case. This circumstance, if there had any real doubt upon the construction of the act, it possibly have induced the court to consider her there was sufficient opening for the construction ted to operate as an excuse for the appellants; but ase appears to me to be too clear for any such con- tion; besides, as was observed by some of the judges , the cause of action by the apprentices had dy arisen, as they had been apprehended and were stody. I cannot, however, but express my surprise e opinion imputed to the sheriff-substitute, that the Geo. 4. c. 52. has the effect of making all the pro- ns of the act founded on applicable to apprentices; eas the obvious intention and construction of the s only to extend the provisions of the 4 Geo. 4. c. 34. ersons engaged in certain other descriptions of ess, as if such other description had been particu- mentioned in it, leaving the distinction untouched

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between such of those provisions as related to appren- tices and such as related to servants, and, applica do singula singulis, applying the separate provisions as t apprentices and as to servants, to apprentices a servants in the additional descriptions of trades.

Professional men, possessed of a reasonable portion information and skill, according to the duties th undertake to perform, and exercising what they possess with reasonable care and diligence in the affai of their employers, certainly ought not to be liable f errors in judgment, whether in matters of law or discretion. Every case, therefore, must depend up its own peculiar circumstances; and when an injury h been sustained, which could not have arisen except fro the want of such reasonable information and skill, the absence of such reasonable skill and diligence, t law holds the attorney liable. In undertaking t client's business he undertakes for the existence a employment of these qualities, and receives the price them.

Such is the principle of the law of England, and th of Scotland does not vary from it. I think this c clearly within the principle; but I must observe t this is a case in which your Lordships would not disposed to disturb the judgment of the court bel without a clear case of miscarriage in the court. Th is no principle of law in dispute; the only question as to its application to the facts of the case; th the degree of information and skill, diligence and to be expected from a particular class of profes men in Scotland, a subject upon which the jud the Court of Session have much better means of

mation than your Lordships can possess. If there were doubt upon this point in the present case your Lordships would be disposed to give great weight to the opinion of the judges of the Court of Session; but that is not the ground upon which the advice I shall give your Lordships is founded,—being of opinion that there was clearly a want of that reasonable degree of information, skill, care, and diligence which is required to protect professional men from the liability to indemnify their employers against the consequences of any error they may commit.

It is much to be regretted that the appellants did not see their liability, and discharge the obligations they had incurred, when that might have been done at the small expense of the two sums of 25*l.*, which the apprentices have received. Great expenses have since been incurred in the court below, which have been necessarily added to the charge upon the appellants, and to which I am compelled to add the respondents costs of this appeal.

I therefore move your Lordships that the interlocutor appealed from be affirmed, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of

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Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP—ARCHIBALD GRAHAME, Solicitors.

[*24th June* 1839.]

(Appeal from the Court of Session, Scotland.)

HENRY BROCK and others, Appellants.[1] (No. 20.)
[*Knight Bruce—John Stuart.*]

Mrs. MARGARET ISABELLA M'CALLUM or WEBSTER and others, Respondents.
[*Tinney — James Anderson.*]

Bonâ fide Payment—Consignation—Bankrupt—Stat. 1696, *c.* 5.—A company having been pressed by a creditor, who threatened legal proceedings, but whose title to discharge the admitted debt the company doubted, remitted the amount to their agents, who, with full authority for that purpose, after depositing the sum in bank, lodged the bank receipt in a process of multiplepoinding then commenced, in order to be disposed of as the court should appoint; and an order of court having thereafter been pronounced, appointing the said agents to consign the admitted sum in bank, upon a receipt taken payable to such person as should be preferred by the court, and to lodge the receipt with the clerk to the process; the company was sequestrated before this order of court had been complied with:—Held, in a question betwixt the creditor and the trustee on the debtor's estate, (affirming the judgment of the Court of Session,) 1. that the amount had been effectually consigned, and formed no part of the sequestrated estate of the debtor; 2. that as a bonâ fide consignation, and equivalent to payment of an admitted debt, which the debtor in the ordinary course of business, and under pressure, agreed to consign, such consignation was not struck at by the act 1696, c. 5.

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[1] Fac. Coll. 14th Nov. 1838; 1 D., B., & M., (new series), p. 1.

1st Division.

Lords Ordinary Corehouse and Cockburn.

MESSRS. CONNELL, merchants in Glasgow, had for some years acted as the agents in Great Britain of Neil M'Callum, who was resident in Jamaica, and by whom various remittances had been made to them, as his agents, both on his own account and on account of the Cousins Cove estate, which he managed or held as executor of his deceased brother Alexander M'Callum, who had also been resident in Jamaica.

In making these remittances to the Connells, Neil M'Callum distinguished the funds or produce which he transmitted on his own account from what he sent home as belonging to the Cousins Cove estate, and in communications with the Connells had expressly desired them to keep the one account distinct from the other.

Acting on the special instructions from Neil M'Callum, the several transactions between him and the Connells were by them kept quite distinct in their books, and, according as they related to his own business or were transactions with him as manager of Cousins Cove, were invariably entered in separate accounts.

The funds which belonged to Neil M'Callum himself, in the hands of the Connells, were fully accounted for to his executor, Mr. Gordon.

Of the funds remitted by Neil M'Callum on account of Cousins Cove, there remained in the hands of the Connells an admitted balance of 2,564*l.* 8*s.* 3*d.*, with interest from 2d March 1836, amounting, on 26th November 1836, to 2,639*l.* 14*s.* 4*d.* It is exclusively to this fund that the present question relates.

Neil M'Callum died in the year 1835, while the Connells held the above balance. He appointed Mr. Gordon to be his executor, who expede confirmation

before the commissaries of Edinburgh on 5th September 1836. Mr. Gordon required payment from the Connells of the sums due on their accounts with Neil M'Callum, both as an individual and as the manager of Cousins Cove; and the Connells, while they settled the balance due on their account with Neil personally, declined payment of the balance due on the Cousins Cove account, in respect they were advised that Mr. Gordon, qua executor simply of Neil, had no valid title to uplift and discharge any part of the estate of Alexander M'Callum which was situated in Scotland, and that an effectual discharge could only be granted by a party obtaining confirmation in this country as in right of Alexander.

A good deal of correspondence took place between the agents in Edinburgh of the parties in regard to this objection, and it was ultimately resolved that the question was one which required to be determined by the Court.

Messrs. Hunter, Campbell, and Co., the agents in Edinburgh of the Connells, wrote to Mr. Bertram, the agent for Mr. Gordon, on 17th October 1836, thus: "With regard to the Cousins Cove balance, we understand you are to exhibit to us the proved will of Alexander M'Callum, and satisfy us that the office of executor passed from Neil M'Callum to Mr. Gordon his executor;" and in answer, Mr. Bertram, on 21st October 1836, wrote: "In reference to your communication of 17th instant, I have written to London for the proved will of Mr. Alexander M'Callum, and I have instructed my correspondent to obtain the opinion of Mr. Burge upon the question, as to whether the office of executor under that will passed from Neil M'Callum to Mr. Gordon his executor;"

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adding, "In the meantime it occurs to me that Messrs. "Connell ought to consign the admitted balance upon "Cousins Cove estate." The suggestion in the latter part of this letter was immediately noticed by Messrs. Hunter, Campbell, and Co., thus:—"You state cor- "rectly what passed between us as to the mode of "clearing away the difficulty regarding Mr. Gordon's "title to discharge the Cousins Cove balance. The "Messrs. Connell are ready to pay that balance the "moment their professional advisers assure them they "are safe to do so. In these circumstances, and as the "only impediment is an objection to your client's title, "which it is in your power to clear up within a few "days, your suggestion as to consignation appears to us "unusual; but if you insist on it, we shall communicate "what you have stated to the Messrs. Connell."

An opinion was obtained, that Mr. Gordon, as the personal representative of Alexander, had in that character a title to those funds recovered by Neil and remitted to Scotland; but, secondly, that Mr. Gordon "would not be the legal representative of Alexander "for the purpose of receiving and giving discharges for "that part of Alexander's personal estate which was in "Scotland, unless Alexander's will is also proved in "Scotland." This opinion and other documents were communicated by Mr. Bertram to Messrs. Hunter, Campbell, and Co. on 11th November 1836, and in reference thereto, in his letter of that date, he says:—"I "trust that these documents, joined to what you already "have in your possession, will remove all obstacle to "the payment of the Cousins Cove estate money to "Mr. Gordon's attorney."

Messrs. Connell refused to make payment to Mr.

Gordon of the balance due by them. In a letter of 19th November 1836, Mr. Bertram stated to Hunter, Campbell, & Co. :—" I must therefore take my own measures " for immediately securing the debt, unless your clients " will without further delay consign its amount. This I " hope they will agree to, since they admit their liability " for the debt, and consignation will save me the neces- " sity of resorting to such steps as may be requisite for " securing my clients. Upon its being made, I have no " objection to discuss the question of title with you, either judicially or by reference." Thereafter, on 5th November 1836, Mr. Bertram writes :—" In your letter of yesterday, refusing to pay the Cousins Cove balance upon the title of Mr. Gordon, as executor of Neil M'Callum, you take no notice of my demand for consignation and of my offer, upon that being made, to discuss the question of title by reference. That demand and offer I now repeat, and in the meantime, to prevent delays, I have sent to Glasgow, for service on Messrs. Connell, the summons in the proper action to force consignation, and to bring all parties interested into the field. As the defenders have consented to dispense with the induciæ, the summons will be ready to call next week, and I beg to intimate that upon its first appearance in the rolls, I shall move for consignation of the admitted balance, unless your clients shall previously comply with my demand. It is a very reasonable demand, as I ask them to do no more than to part with money which they admit to be not their own. Their compliance will prevent the necessity of my resorting to unpleasant measures. Of the validity of Mr. Gordon's title

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"I have not yet seen reason to change my opinion." And again, on 25th November 1836, Mr. Bertram writes:—"Your letter received this morning does not "take any notice of the demand for consignation extra-"judicially, and the offer in that case of a reference "upon the question of title, which I made in my letter "of 19th instant, and repeated in my letter of yester-"day."

Messrs. Hunter, Campbell, and Co., on 26th November 1836, in a letter to Mr. Bertram, stated:—"We beg "to inform you that the Messrs. Connell have remitted "to us the sum of 2,639*l.* 14*s.* 4*d.*, being the amount "of the balance on the Cousins Cove account, with "interest at four per cent. to yesterday. We have in "the meantime lodged that sum in the British Linen "Company, on a deposit-receipt in our name, which, "as the Messrs. Connell's sole desire is to obtain a "sufficient discharge of what they owe, we are ready to "dispose of in any way that is consistent with their "safety. From this date they shall be accountable "only for bank interest on that sum. We have no "objection, on your naming the clerk with whom you "mean to lodge the multiplepoinding, to place the "deposit-receipt in his hands, indorsed by us, and with "the following marking:—'This receipt contains the "'admitted balance on the Messrs. Connell's account "'for Cousins Cove estate, and is lodged with the "'clerk to be disposed of as the Lord Ordinary may "'appoint in multiplepoinding Connells v. the Repre-"'sentatives of Alexander and Neil M'Callum.'"

The remittance to Hunter, Campbell, and Co. was entered in Messrs. Connell's cash-book thus:—

" 1836,

" Nov. 25. Cousins Cove Estate.—Remitted through " British Linen Company to Hunter, " Campbell, and Co., W. S., Edinburgh, " to be disposed of by them in payment " or consignation of balance due this " estate - - £2,639 14 4"

And this entry in the cash-book was transferred to the ledger, the account of the Cousins Cove estate being debited with the amount thus:—

" 1836,

" Nov. 25. To cash - - - £2,639 14 4"

Messrs. Hunter, Campbell, and Co. deposited the money in bank, taking a receipt for it in their own name in these terms:—

" £2,639 14*s.* 4*d.* " British Linen Company's Office, Edinburgh, 26th Nov. 1836.

" Received from Messrs. Hunter, Campell, and Co., " W. S., Edinburgh, two thousand six hundred and " thirty-nine pounds, 14*s.* 4*d.*, which is this day placed " to the credit of their deposit-account with the British " Linen Company. (Signed) *Alex. Goodsir*, Sec."

Mr. Bertram wrote, on the 29th November 1836,—" I am glad to find that the Messrs. Connell have at last " done what I long since requested them to do, by con- " signing the money admitted by them to be due."

A marking on the back of the deposit-receipt, as adjusted by Messrs. Hunter, Campbell, and Co. and Mr. Bertram, was in these terms:—" This receipt contains the balance admitted by Messrs. Connell to due on their account current for Cousins Cove te, and is lodged in process of multiplepoinding eir instance against the representatives of Alex-

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"ander and Neil M'Callum, in order to be disposed
"as the Court shall appoint. (Signed) *Hunte*
"*Campbell*, and Co., W. S."

The deposit-receipt was placed in the hands of t
clerk in Court to the process upon 30th Novemb
1836.

Previous to the case appearing in the rolls of Cou
Mr. Bertram, on 15th December 1836, intimated th
it occurred to him, "that it will be proper to have
"contents of the deposit-receipt which you lodged
"the clerk's hands consigned judicially upon a rece
"taken payable to the party or parties who may
"preferred. I shall accordingly make a motion
"that effect, upon the case appearing in the roll."
Accordingly, when the cause did appear in the rolls, on the motion of Mr. Gordon's counsel, an interlocutor was pronounced by the Lord Ordinary (Corehouse) on the 21st Dec. 1836: "Farther, appoints the pursuers to "consign the admitted sum of 2,639*l.* 14*s.* 4*d.*, with "bank interest thereon since 26th November last, in "the bank of the British Linen Company, and that "upon a receipt taken payable to such person or "persons as shall be preferred thereto by the Lord "Ordinary or the Court in the course of this process, "and to lodge the same in the hands of the clerk; and "for that purpose authorizes their agents, Messrs. "Hunter, Campbell, and Co., to get up from the "clerk of process the receipts granted to them for the "foresaid sum, of the above dates, and lodged in pro-"cess, in order that they may obtain payment thereof; "reserving to the pursuers to state in this process all "objections competent to the title to discharge of the

" party who may be preferred, with all answers to such " objections."

Before the agents of Messrs. Connell could act on the interlocutor of the Lord Ordinary, and within three days after its date, the estates of Messrs. Connell were sequestrated, in virtue of the Bankrupt Statute, 54 Geo. 3., c. 137; the money remaining with the British Linen Company, deposited in name of Messrs. Hunter, Campbell, and Co., and the deposit-receipt was left in the hands of the clerk of court.

Henry Brock, accountant in Glasgow, as trustee on the sequestrated estate, craved leave to sist himself " as " a party to the action, for the interest of the creditors " of the raisers;" and the Lord Ordinary (Corehouse,) pronounced an interlocutor, (3d Feb. 1837,) holding him " sisted, as trustee foresaid, a party to this action, and " allows the same to proceed accordingly."

Thereafter, an order was pronounced by the Lord Ordinary, Cockburn, (before whom the cause then depended, in place of Lord Corehouse, removed to the Inner House,) appointing Mr. Brock " to give in a " condescendence of the fund in medio by Tuesday " next, with certification," to which answers were lodged for Mr. Gordon; and on those pleadings, as subsequently revised, the record was closed.

The Lord Ordinary (Cockburn) having heard parties upon the closed record, pronounced the following interlocutor, accompanied with the note thereto annexed, which explains the nature of the pleas of the parties respectively (31st May 1838):—" The Lord Ordinary having heard " the counsel for the parties, and considered the record, " prefers the claim of Henry Brock, as trustee on the " sequestrated estate of Arthur and James Connell, to

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" the fund in medio, and decerns: Finds him entitled to " expenses, appoints an account thereof to be given in, " and when lodged remits to the auditor to tax and " report. (Signed) H. COCKBURN."

" *Note.*—Whatever difficulty there may be in this " case, it is much more in the construction to be put " upon the facts than in the legal rule.

" The general view of the facts, as the Lord Ordi- " nary sees them, is this:—Messrs. Connell owed " 2,639*l.* 14*s.* 4*d.* to the estate of the deceased Alex- " ander M'Callum. Payment of this was demanded " by the claimant William Gordon, as his executor. ' The Connells did not dispute the debt, but they " denied Gordon's right to receive, and consequently " his power to discharge it. This point is not yet " settled. In this situation, Gordon wished the money " to be extra-judicially consigned, for this process of " multiplepoinding had not then been instituted. This " proposal gave rise to a correspondence between the " agents of these parties, the result of which was, that " the Connells sent the money to their own agents in " Edinburgh, and made an entry in their books, stating " that the sum was to be disposed of by them (their " agents) in payment 'or consignation of the balance " ' due to this estate.' There are other entries made " in order to square the books, and to account for the " cash being no longer in the Connells hands, but " nothing which alters the purpose for which they " parted with it. The summons in this action being " soon afterwards executed, the agents placed the bank " receipt for the money in the hands of the clerk to the " process, with a marking on its back, bearing:—'This " ' receipt contains the balance admitted by the Messrs

ıll to be due on their account current for ıs Cove estate, and is lodged in process of ılepoinding at their instance against Alexander eil M'Callum, in order to be disposed of as ourt shall appoint.' In about three weeks ıis, judicial consignation was ordered by the Ordinary to be made by the Connells, the to be taken, 'payable to such person or per- s shall be preferred by the Lord Ordinary or ıurt; and reserving to the pursuers all objec- o the title to discharge of the party who may be red.' Nothing was done in implement of this and three days thereafter the Messrs. Connell questrated. The whole of these proceedings ıce within sixty days of their bankruptcy.

money is now claimed by the trustee for the s, and he is opposed by Gordon, who claims ıe estate of Alexander M'Callum.

Lord Ordinary has preferred the trustee, and or other of these two grounds,—

, he is of opinion that the bankrupts were ivested of the money, and that, it being theirs ıey were sequestrated, it belongs to their cre- The true import of the arrangement, he was, that Gordon was distrustful of the safety money while in the bankrupts hands,—that re distrustful of his title to receive it, and that e circumstances it was put into a situation of or both, but that the voluntary consignation : transfer the property, and was not meant to

receipt (not the property or the right to it, : mere receipt) was for a time in the hands of

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" the Connells agents, but for Connells behoof partly, " and then went into the hands of the clerk, not as a " completed conveyance to Gordon, or to any one, but " for the security of the party who should ultimately be " found to have right to it. There was no assignation " intimated or unintimated; and, supposing that an " indorsation would have been effectual, there was no " indorsation. If there was a trust created in the per- " sons of the agents or of the clerk, it was a trust, partly " for the protection of what was understood to be still " the truster's property, though subject to a claim, and " rather than interpose a trustee to be a mere holder " for that claimant, if it had been intended to complete " his right as proprietor, payment would have been " made to him at once in the ordinary way. In short, " there is nothing here but what occurs in most cases of " consignation, where the consignor, instead of being " divested, rather marks, by the very act of only con- " signing, that though he may have quitted the pos- " session, and fettered his power of administration, he " has not ceased to have the property. Accordingly, " on the one hand, some act remained to be performed " by the bankrupts before the transference could be " complete. Even the order for judicial consignation, " which was given after all the other proceedings on " which Gordon founds, was an order on the bank- " rupts. And, on the other hand, can it be said, that " without any such additional act by the bankrupts, " Gordon had actually obtained the right? If it had " been he who had failed, could his creditors have " claimed this money as already their debtors, while the " doubt as to his title, on account of which it had been " refused to be given him, was still as unsettled as ever

Suppose that there had been no bankruptcy, and that Gordon's title had been found bad, would not the Connells have simply resumed possession of the money as their own? Would they have had to derive a new right to it by a conveyance from Gordon, who the consignation had made the owner, while the validity of his title was under discussion?

'The cases of Gray v. Ross, 16th January 1706, and of Baird, 4th January 1744, though not identical with this one in the circumstances, proceed on the principle that a deposit with a third party, for behoof of the person who should be ascertained to have the best right, did not divest the depositor.

'Second, If there was a completed transference it was in violation of the act 1696.

'The ground taken by Gordon at the debate was, that this was a payment in money, and in the common course of business, of a debt already due.

'The cases of Speir, 30th May 1827, and of Mitchell, 26th June 1834, enter deeply into this matter, and seem to furnish the legal rule. In the first it was found, 'that a payment in cash by a bankrupt, within sixty days from his bankruptcy, to an indorser of a bill accepted by him but not then due, as a provision for the said bill when it became due, is reducible under the act 1696, c. 5, independent of fraud at common law.' The case was decided on the distinction between a payment made in the ordinary way, as the immediate extinction of a debt, and as a mere preparation for paying a debt not yet actually exigible. The second went on exactly the same ground. A person, within sixty days of bankruptcy, sold a house and paid the price

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"rest, merely because, instead of making his demand, 'like them, extra-judicially, he chooses to do it by 'an action, and because, in that action, an honest 'defender is willing, for his own credit, or his adversary's comfort, to throw the money into court, reserving his objections to the adversary's title to receive it."

The respondent having presented a reclaiming note the First Division of the Court of Session against his interlocutor, their Lordships (14th Nov. 1838) pronounced the following interlocutor:—"The Lords having advised this reclaiming note, and heard counsel for the parties, alter the interlocutor reclaimed 'against, and find that the sum of 2,639*l.* 14*s.* 4*d.* "sterling, in dispute, contained in the deposit-receipt, "No. 4. of process, forms no part of the sequestrated "estate of the raisers of this process, and is not claimable by the trustee upon that estate in competition "with the party in right of the deceased Neil M'Callum "or Alexander M'Callum, and repel the claim and "pleas maintained by the said trustee: Find that the "said sum, as the fund or part of the fund in medio "in this process, belongs to such of the defenders or "others as shall be preferred thereto in the competition; and with these findings, remit to the Lord "Ordinary to proceed farther in the cause: Find the "compearer, Henry Brock, the trustee on the said "estate, liable in expenses; allow an account thereof "to be given in, and remit the same, when lodged, to "the auditor, to be taxed."

Judgment of Court, 14th Nov. 1838.

The trustee, having petitioned the Court to grant authority to present an appeal against this interlocutory judgment, leave was granted in December 1838.

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At this stage Mr. Gordon died. The respondent, Mrs. Margaret Isabella M'Callum or Webster, who is the only child of Alexander M'Callum, as well as the residuary legatee of her uncle, Neil M'Callum, obtained a decree-dative as executrix-dative qua residuary legatee of the said Neil M'Callum, ad omissa et quoad non executa, and thereupon she and her husband, for his interest, lodged, 19th January 1839, in process, a minute craving that they should be sisted as claimants in room of Mr. Gordon. An interlocutor was accordingly pronounced to that effect.

Connells trustee appealed.

Appellants Argument.

Appellants.—The interlocutor appealed from was objectionable, while on both grounds the interlocutor of the Lord Ordinary was well founded in the legal conclusions deducible from the facts of the case. (1.) The question whether there was a complete transfer of the fund, so as to be beyond the reach of Messrs. Connell or the trustee, would depend not merely on the terms of the correspondence, but on the views which the parties took of that correspondence at the time. Now Bertram's own misgivings on the subject showed that he did not act as if the money was safely consigned in court beyond the power of the consignors or the diligence of their creditors. His letter of the 15th December 1836 admits distinctly that there was no consignation at that date, and that the money was not then taken out of the order and disposition of the Connells. If the Connells were divested of the fund by the mere remittance to their own agents in Edinburgh, in whom was the fund vested? Not in the hands of the respondent,—not even

in manibus of the court, like a consigned fund awaiting the order of the judge. If the money had been lost on whom would the loss have fallen? Not on the respondent, who had no control over the fund, and who had not even got consignation. There was no transfer of the money; indeed Messrs. Hunter, Campbell, and Co. had no authority to transfer the money. [*Lord Chancellor.*—It is no where made part of the appellants case that Hunter, Campbell, and Co. had no authority.] It was beyond their authority; and the point is now open under the third plea in law in these words: "There is no ground, in the circumstances of the case, "for maintaining that the bankrupts were divested "of their right to the sum contained in the deposit-"receipt," &c. And on the facts, the legal title would be held, either in Scotch or English law, to be in the Connells. [*Lord Chancellor.* — But look at Hunter, Campbell, and Co.'s letter of the 26th November 1836.] The money was intercepted however before consignation, by the sequestration of the parties ordered to make consignation, for at the date of the sequestration there had been merely an order to consign; so that there was no consignation, either judicial or extra-judicial. Gray v. Lord Ross, 16th January 1706 (Mor. 7724.); Baird v. Murray, 4th January 1744 (Mor. 7738.)

(2.) Supposing that there was a transference of the fund, so as to prevent its acquisition by the appellant for behoof of the general creditors in the same direct manner as if it had been still in bonis of the bankrupts at the date of the sequestration, the transaction by which such transference was effected was reducible under the act 1696, c. 5. On the eve of bankruptcy

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no act can be done so as to alter the condition of the creditors, who as a body are supposed to be in right of the fund from the time of constructive bankruptcy. (2 Bell, Com. 205—208.) By the act 1696, c. 5., all voluntary deeds, by which, directly or indirectly, the bankrupt gives over his effects to one creditor preferably to others, within sixty days before his bankruptcy, whether in satisfaction of his debt or merely in farther security, are declared null and void; and according to the construction adopted by the Court the deeds struck at are not those merely for the completion of which written conveyances are necessary, but all acts whatsoever subject to the known exception of payments in cash in the ordinary course of business, although no writing had intervened or been necessary. (See the cases cited in 2 Bell, 211; Forbes, 27th January 1715, Mor. 1124, 2 Bell, 212; M'Math v. M'Kellar's Trustees, 1st March 1791, Bell's Cases, 22: President Campbell's opinion, p. 39; Moncreiff v. Cockburn's Creditors, 8th February 1694, 1 Fount., 596.) Regard ought especially to be had to the two recent cases noticed by the Lord Ordinary, Speir v. Dunlop, 30th May 1827[1], remitted back by the House of Lords[2] for reconsideration where the Court[3] reduced the transaction as falling within the act 1696, the doctrine established being that if an ultroneous payment be made as a security against a debt to become due at a subsequent period, the transaction was reducible, and the case of Mitchell v. Rodger, 26th June 1834[4], where the decision in Speir v. Dunlop was recognized. Now, in the present case, there had been nothing done by the bankrupts beyond a deposi-

[1] 4 S. & D. 92. and 5 S. & D. 680.
[2] 2 Wils. & Shaw, 253.
[3] Fac. Coll. 30th May 1827, p. 516.
[4] 12 S. & D. 802.

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tation in the hands of a third party to provide for payment of a debt in their estimation not yet exigible by the creditor, and there merely had followed a change in the mere depositary of the bank receipt. But there had been no consignation by judicial authority, but merely extra-judicial consignation, and not compulsory, and therefore the transaction was within the statute. The respondents could not show that there had been any pressure on the Connells for payment; there had been therefore no staving-off of pressure. Nothing had been got by hastening the action, as Messrs. Connell merely remitted the money to their agents from propriety and delicacy towards all parties.

Respondents Argument.

Respondents.—There were two questions: 1. Whether the fund was subject to the order and disposition of the Connells at the date of the bankruptcy; and, 2. Supposing it was not so whether the payment was struck at by the act 1696, c. 5. The facts as to the situation of parties are not disputed. There had been no refusal to pay on the ground that the money was not due; but merely a delay caused from doubts raised as to the necessity of confirmation by Neil M'Callum's executor in Scotland; a ground taken, it might be remarked, more than sixty days before the bankruptcy. On that point, it might be observed in passing, there was no necessity for such confirmation as the case of Frith v. Buchanan, Hamilton, and Co.[1], in reference to the statute 4 Geo. 4. c. 98., vesting moveable estate in the next of kin, ipso jure, without confirmation, established. But the multiplepoinding was necessary, in order to

[1] 15 D., B., & M., 729.

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effect a judicial discharge for the party; and the money was remitted to await the decree in that action. It had been said that Hunter, Campbell, and Co. exceeded their powers, and therefore that the money must still be held as not having passed from the Connells; but that point was not raised, as a Noble Lord had remarked, and the third plea did not embrace it. Besides, this new plea was excluded, for it had been assumed by the appellants throughout their case that Hunter, Campbell, and Co. did act with authority; and in any view the authority to pay or consign was clear from the correspondence,—the money having been sent to Edinburgh in answer to a demand of consignation. Then, as to the effect of the receipt by the clerk of the Court;—there was no Accountant General in Scotland; and when money was paid in to await the decree of the Court, the practice was, if there was unwillingness, to take an order of Court on the party to consign, or if there was desire on one part and willingness on the other, then voluntary consignation was equivalent, and so say the Lords Gillies and Corehouse.[1] Holding this to have been judicial consignation,—and the appellants admit that the transfer was complete,—if there was judicial consignation, which there certainly was, (there having been consignation by consent, the clearest proof of the fact,) the asking of the order for consignation was a mere additional precaution,—a change in the depositary, and dispensing with Hunter, Campbell, and Co. as the interposed party, and merely matter of arrangement. It was to be observed, that the interlocutor ordering consignation of the receipt was by

[1] 1 D., B., & M., new series, p. 6.

Lord Corehouse, (who held in the Inner House that there was judicial consignation of the fund,) and not by Lord Cockburn, who held an opposite opinion.

In Scotland risk was no criterion of property. Property is not transferred, though it may be at the risk of the buyer. So property sold remains at the risk of the buyer, but is not his till delivery.[1] A sounder criterion of risk is, whether the creditors could have arrested. The Connells could not; neither would an arrestment by their creditors have been effectual.[2] The trustee had no better right to the fund than either the Connells or their creditors; so that upon either criterion the ground taken was untenable.

(2.) The transaction was not reducible under the act 1696, c. 5. The best answer to the remark, that the Judges below had not heard this point, was the fact that the report bears that counsel for the trustee of the Connells were heard on both points. 1. This had not been a voluntary act; 2, payment had been demanded before the sixty days; 3, the interlocutor, finding the holder of the fund liable in once and single payment, discharged the Connells; and, 4, the obligation existed before the decree; so that is not a voluntary act which a party is compellable to do in performance of a legal obligation. But whether it was voluntary or not it was the payment of a debt. Payments in cash are not struck at by the act, and consignation is defined by Erskine[3] as in the judgment of law equivalent to

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[1] Gordon, 4 Bro. Supp.; Robertson v. Creditors of Mathieson, 1st Feb. 1738, Mor. 3077.

[2] Gordon v. Hughes and Dunbar, 11th June 1824, 2 Sh. App. 310; Sourer v. Smith, Mor. 744; Stalker, Mor. 745.

[3] B. iii. tit. 4. s. 5.

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payment. Again, whatever the transaction be called, whether payment or otherwise, it was a payment in the ordinary course of business, and so not struck at.[1] The appellant had rejected the ground on which the Lord Ordinary put the case, which was, that though there was consignation there had not been payment. It was now said, there had neither been consignation nor payment; but merely security till consignation was forced. [*Knight Bruce.*—Yes.] But then the Court, disagreeing with the Lord Ordinary, held that there had been consignation; and so the Lord Ordinary's view that the fund was in medio failed.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—In this case the first division of the Court of Session, by an unanimous judgment, differed from the Lord Ordinary, and altered his interlocutor. From respect for the opinion of the Lord Ordinary I thought it right to examine carefully all the circumstances of the case and all the authorities referred to. Although I did not upon the argument at the bar entertain any doubt of the correctness of the judgment of the Court, this investigation has only confirmed that opinion.

Messrs. Connell of Glasgow had been employed by Neil M'Callum, in the course of which employment a large sum became due from them to him, which was paid to William Gordon his executor, and is not now in question. But he having directed them to keep separate accounts of the transactions respecting a West India property called Cousins Cove estate, to which it is said that Alexander M'Callum, to whom Neil was

[1] Dundas, 2d June 1808, F. C.

ecutor, had been entitled as mortgagee, they (Messrs. nnell) questioned the authority of Mr. Gordon, as cutor of Neil M'Callum, to demand payment of the ance of that account, contending that they could not ly pay to a personal representative of Alexander; on this the doubt arose, although, as all their ings had been with Neil M'Callum, it is difficult to erstand the ground; but it is not necessary to con- that question. Mr. Gordon demanded payment; srs. Connell admitted the debt; but, having raised objection, Mr. Bertram, Mr. Gordon's agent, in his r of the 21st October 1836, after informing them he had written to London on the subject, observes it occurred to him that Messrs. Connell ought in meantime to consign the admitted balance upon Cousins Cove estate. On the 19th November Bertram again writes that measures will be imme- ely taken for recovering the debt unless Messrs. nell consign the amount. On the 21st November srs. Hunter, Campbell, and Co., the agents of srs. Connell, request Mr. Bertram to pause before ng the steps pointed out; and on the 23d they ine to pay Mr. Gordon, and warn him against any s of diligence. On the 24th Mr. Bertram informed agents that he had given directions to commence the per action to enforce consignation, and that he uld proceed unless they complied with his demand of signation; and on the 25th renewed his demand for signation extra-judicially. On the 26th Messrs. Hun- Campbell, and Co. informed Mr. Bertram that ssrs. Connell had remitted the balance to them, and t they had lodged it in the British Linen Company's nk, on a deposit-receipt, in their own names, and that

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they were ready to dispose of it in any way consistent with the safety of Messrs. Connell, and that they had no objection to place the deposit-receipt in the hands of the clerk to be named in the action of multiplepoinding, with a marking that it would be disposed of as the Lord Ordinary should appoint, and giving notice that bank interest only would be paid from that time.

On the 29th November Mr. Bertram, in answer to that proposal, said that he was glad that Messrs. Connell had at last done what he had so long requested them to do, by consigning the money. The money was placed by the British Linen Company to the credit of Hunter, Campbell, and Co., and a receipt given in their name, which they, according to their undertaking, deposited with the clerk in the action, with this indorsement: "This receipt contains the balance admitted by Messrs. "Connell to be due on their account current for "Cousins Cove estate, and is lodged in the process "of multiplepoinding at their instance against the "representatives of Alexander and Neil M'Callum "in order to be disposed of as the court shall "appoint."

On the 15th December Mr. Bertram proposed that the contents of the deposit-receipt lodged in the clerk's hands should be consigned judicially upon a receipt taken payable to the parties who might be preferred, and stating that he should make a motion to that effect; and accordingly, on the 21st December, an interlocutor was pronounced appointing the pursuers to consign the admitted balance, with bank interest from the time of the deposit, and that upon a receipt taken payable to such person or persons as should be preferred by the court in the course of the process, and to lodge the

ı the hands of the clerk; and for that purpose the Ordinary authorized the agents, Messrs. Hunter, ell, and Co., to get up from the clerk to the pro- : receipt granted to them, and lodged in process, r that they might change the deposit, reserving pursuers to state all objections to the title of ı to discharge.

:e days after this, that is on 24th December, the of Messrs. Connell were sequestrated. The Lord ry thought that the trustee on their estate was to this sum; but the Inner House were of that it formed no part of the sequestrated

: question was raised at the bar as to the autho- Hunter, Campbell, and Co. so to deal with this ıt I find no ground for any such question. In ellants case it is stated that Messrs. Connell this remittance in their books in these words:— Nov. Cousins Cove estate. Remitted the British ı Company to Hunter and Co., to be disposed by in payment or consignation of balance due to state;" and it is stated that Hunter, Campbell, . were to dispose of the sum in payment or ıtion of the balance when they were satisfied ɔuld be disposed of in a way consistent with the safety of their clients. What Hunter, Camp- d Co. did was clearly within this authority. stion therefore is, whether by the law of Scot- ı case in which a debtor pressed by one claiming editor, and threatened with legal proceedings, tioning the title of the claimant to give a dis- or the admitted debt, agrees to consign the and actually remits it to his agents, who, with

whom it was made, after which it would I apprehend have been impossible for him to raise any question as to the consignation being payment, so far as the debtor was concerned; but beyond this, the party to whom the consignation is made, with the full authority of the debtor, enters fresh into a personal obligation to pay to whomsoever might be found entitled, and afterwards submits, and is subjected to a judicial order, to part with all control over the money, for the purpose of placing it under the exclusive control of the Court.

I have not particularly adverted to the position of the money having been, at the time of the arrangement made, in the hands of the British Linen Company under this receipt, because I consider it as put into the hands of Hunter, Campbell, and Co., who in fact, had the control over it; which is the most favourable view of the case for the appellants. If their instructions had been to pay and not to consign, no question could have arisen; and why is not consignation to be equally protected as payment? The authorities[1] in the law of Scotland clearly show that consignation is held equivalent to payment. There is a total absence of all evidence of fraud or undue preference;—so that the only just conclusion to be arrived at is, that this was a payment admitted to be in the ordinary course of business, and in the only mode in which payment could be made when doubts existed as to the legal title of the claimant to recover payment of an admitted debt. If this judgment be not according to the law of Scotland, then, although a debtor may pay a debt within the sixty days, he cannot under any circumstances make consignation to secure

[1] Ersk. b. 4. tit. 3. sect. 5.

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it, however pressed by his creditors, and however impossible it may be to make actual payment with safety to himself.

I have no doubt as to the propriety of advising your Lordships to affirm the interlocutory judgment appealed from, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

G. & T. WEBSTER—RICHARDSON and CONNELL, Solicitors.

[27*th June* 1839.]

(Appeal from the Court of Session, Scotland.)

(Ex parte.)

JAMES CHARLES MACRAE, Appellant.[1] (No. 21.)

[*Sir W. Follett—Sandford.*]

MARIA LE MAISTRE MACRAE or HYNDMAN, and Husband, Respondent.

Outlawry—Entail—Trust.—A party executed a disposition of his heritable property ex facie absolute, but which the disponees afterwards declared by a separate deed was held in trust for the grantor, his heirs and disponees. He was afterwards cited to appear before the Court of Justiciary for murder alleged to have been committed previous to the date of said disposition; and, on his not appearing, sentence of fugitation passed, and denunciation followed thereon, which was recorded. Some years afterwards, when still unrelaxed, he executed a deed, directing his said trustees to execute a strict entail of his property in favour of certain parties, which was accordingly done, and after his death recorded by the trustees. In a challenge of the entail by the heir at law,—Held (affirming the judgment of the Court of Session) that the entail, and subsequent registration thereof, were valid and effectual, in respect that a sentence of outlawry does not deprive a party of the right of absolute disposal of the fee of his property.

1st DIVISION.

Lord Ordinary Moncreiff.

THE late James Macrae esq., of Holmains, was, on 26th May 1790, cited edictally, on criminal letters raised against him at the instance of his Majesty's

[1] Fac. Coll. 22d Nov. 1836; 15 D., B., & M., 54., and App. 1312.

› say, on the 8th May 1790, Mr. Macrae had exe- d an absolute conveyance of his estate of Holmains vour of Lord Glencairn and Mr. Alexander Young the survivor of them, and their heirs and assignees, ably and irredeemably, with an assignation to the s falling due from and after Whitsunday 1789. n the precept contained in the above conveyance infeftment was taken on 15th May 1790, in favour of disponees, and duly recorded. After the death of l Glencairn, Mr. Young, the survivor, executed on April 1793 an absolute conveyance of the same e in favour of Messrs. Duncombe, Pettiwood, and Maistre, and the survivors or survivor of them and assignees. The last-named gentlemen executed in same year, 1793, a deed of declaration of trust reby they declared that the said estate was vested iem "in trust only for the use and behoof of the id James Macrae, his heirs and disponees, and for the roper support and maintenance of his family, but in o shape for our own use and benefit or the use and ehoof of any of us," &c. "And further, we hereby ind and oblige ourselves to denude of this trust henever so required by the said James Macrae esq., nd his heirs or disponees, and to dispone and recon- ey the said lands, and to the said James Macrae imself, or any other person or persons having right om him to the same." After this trust Mr. Macrae cuted several settlements in favour of his son and ghter, which, however, he afterwards revoked May 1807) by a deed or mandate to his trustees, reby he authorized them to make and execute a t entail of the estate of Holmains in favour of his James Charles Macrae (the appellant) and the heirs

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whomsoever of his body, whom failing, to his only daughter Mrs. Hyndman (the respondent), with other substitutions, and binding himself and his heirs to warrant such deed of entail in the most ample manner. The same deed also contained a nomination of the trustees and one Mr. Jack as tutors and curators to his children failing their mother.

These trustees accordingly, on 7th and 10th March 1809, executed a deed of strict entail of the said estate, in favour of the appellant and the other heirs therein named. An annuity was reserved for Mr. Macrae during his life, and a provision of 5,000*l.* which he left to the respondent, and declared to be a real burden affecting the entailed lands. The entail contained a revocation of the previous dispositions; it being declared however, that the same became effectual if the entail should be found ineffectual. On 13th May 1809 infeftment on this entail was taken in favour of the appellant.

Mr. Macrae died unrelaxed on 16th January 1820, leaving his son, the appellant, then at the age of twenty-nine years, and the respondent, Mrs. Hyndman, his only daughter, who was born in 1800, then still a minor.

In May 1820 the trustees petitioned the Court for authority to record the entail, which was accordingly done. On his father's death the appellant entered into possession of the estate, which he held for some years, under the entail; but in June 1831 he raised an action of reduction, concluding for reduction of the entail and of the previous deeds as the deeds and warrant on which it proceeded.

Mrs. Hyndman the respondent resisted the reduction.

The pleas maintained by the parties respectively upon

lidity of the deed of entail were (as stated on the l) in these terms:—

The late Mr. Macrae having been outlawed by ice of the Court of Justiciary, and this sentence of ry and fugitation having been followed up by of denunciation at the instance of both the public rivate prosecutors, and these letters having been executed and recorded, he became civiliter mortuus, st the benefit of the law of the country, to which s declared a fugitive and a rebel. 2. An outlaw, circumstances stated, having lost and forfeited his person, can do no act, directly nor indirectly, by the right of his heirs in his heritable property e injured or affected; and he can grant no mandate hird party to execute or subscribe any deed which ad not the legal power of executing himself. e criminal proceedings against the late Mr. Macrae, count of the murder of Sir George Ramsay of , deprived him of all right in and to his heritable in Scotland; and the different deeds executed by ere invalid, to the effect of depriving his heirs of ight which had opened to them so long as the ce of outlawry was unrecalled. 4. The trust deed ted in favour of Lord Glencairn and Mr. Young, executed subsequent to the crime of which the Mr. Macrae was accused, and in consequence of he was declared an outlaw and a fugitive, could ave the effect of preserving to him a right to the of Holmains, or of validating the deeds subse- ly executed by his directions with regard to the that estate. 5. Where a property is disponed in for the benefit of an individual and his heirs, ustees are merely the representatives of those indi-

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viduals as their separate rights emerge. 6. The plea of homologation does not apply to this deed of entail now under reduction, in the circumstances of the case.[1]

1. The deed of entail under reduction is ex facie a formal and effectual entail. 2. The sentence of outlawry against Mr. Macrae did not in any way affect his right to the fee of the estate. It merely operated a forfeiture of his moveables, and of his liferent interest his heritable estate. Besides, Mr. Macrae having before he was cited on the criminal letters, conveyed the estate to Lord Glencairn and Mr. Young, and having been feudally divested of the fee prior to the outlawry, it would not have been competent at any rate to object to the subsequent deeds which are under reduction, on the ground that they are struck at by the outlawry. 3. The entail has been homologated by the pursuer Mackenzie, 4th December 1767.[2] 4. It is jus tertii in the pursuer to found upon the supposed infringement of the rights of the Crown.

The Lord Ordinary (9th March 1833) ordered cases and thereafter (19th Nov. 1833) his Lordship, upon advising the cases, made avizandum to the court, adding the following note:—"It would be proper to report "this case to the court, on account of its peculiarity "and admitted novelty. But the Lord Ordinary, "though he has carefully considered the argument,

[1] Stat. 1592, c. 109, 128; Ersk. b. ii. tit. 5. s. 57; Stair, b. iv. tit. 47. s. 10, 11; 2 Bank. 257, vol. iii. p. 100; 4 Blackst. Com. 319; Coutts v. Durie, 30th Nov. 1791, Mor. 4775; Davidson v. Kidd, 20th Dec. 1797; Birrell v. Birrell, 14th Dec. 1825, Fac. Coll.; Angus v. Angus, 6th Dec. 1825, Fac. Coll.; Dick v. Gillies, 4th July 1828, Fac. Coll.; Gardner v. Gardner, 3d Dec. 1830, Fac. Coll.; and Colquhoun v. Colquhoun, 16th Dec. 1828, Fac. Coll., and cases therein cited.

[2] Dict. 5665.

oth in a very full hearing and in the revised cases, inks it proper to report the cause without at present pressing any opinion; because it will be seen that was the counsel who was privately consulted by e pursuer in 1820, and that something in the argu-ent turns on the nature and effect of that consulta-on. The only observation he has to make is, that, hen it is ascertained that the sentence of the Jus-iary was followed by denunciation of the deceased s an outlaw, duly recorded, if the case of the de-enders were to depend entirely on the proposition in aw anxiously and confidently maintained by them in this case, that such an outlaw is under no other or different disability for the performance of legal acts, than that which attaches to a person denounced on letters of horning for a civil debt, he should think that it involved a question of very great importance. He is not at present prepared to assent to the doctrine. But the case may not, and probably does not, depend on that point. (Signed) "J. W. M."

The First Division of the Court, upon advising the ause, intimated an opinion that in the special circum-tances no homologation of the entail had taken place; but in regard to the effect of the sentence of out-lawry and the recorded denunciation, their Lordships differed equally in opinion, and a hearing in their Lord-ships presence was ordered.

Before the cause was disposed of, a supplementary reduction was raised, in order to set aside the registra-tion of the entail and the order on which it proceeded. The record in that action was laid before the court long with the original cause, but the actions were not njoined.

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The Lords of the First Division (4th February 1834) having resumed consideration of the cause, ordered supplementary cases, which were advised on 9th July 1834, at which time Lord Mackenzie had become a judge of that division in room of Lord Craigie deceased. Their Lordships being then again equally divided, the cause was appointed to be argued by one counsel of a side, after which the whole pleadings were laid before the other judges, under one interlocutor, in these terms: "Remit to the Lords of the Second Division and per- "manent Lords Ordinary, and request their Lordships "opinions, either severally or collectively, on the ques- "tion, Whether the deed of entail executed by Mr. Dun- "combe and others by mandate of 6th May 1807 "from the late Mr. Macrae, then under sentence of "outlawry and fugitation by the High Court of Jus- "ticiary, for failing to appear to answer to an indict- "ment for murder, be liable to reduction at the instance "of his son, the pursuer, his heir at law?"

Written opinions by the other judges having been returned[1], the cause was finally advised (22d November 1836) by the Lords of the First Division, who, in both actions, pronounced this interlocutor:—"Sustain the "defences, assoilzie the defenders from the whole con- "clusions of the libel, and decern, and find no expenses "due to either party?"

Judgment of Court, 22d Nov. 1836.

The pursuer appealed.

The cause was heard ex parte, no case having been lodged for the defenders.

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[1] See these opinions in the reports of the case in Fac. Coll., 22d Nov. 1836, and in 15 D., B., & M., 64.

pellant.—In the original action.—The ground taken
ıe Court below, that sentence of outlawry did not
: the civil rights of a party to a greater extent,
nciation following, than diligence of horning for not
ıg a debt, was ill founded. 1. Outlawry for crimes
ıd prior to denunciation or horning; 2. Denun-
n, as introduced by statute, was limited in its
s to the penalties of escheat, and no severe personal
ilities followed; and, 3. The effects of outlawry for
: continued the same as they had always been,
the effects of civil rebellion were at an end. Out-
', when considered in reference to its origin and
quences, and the authority from which it emanated,
ly avoided the freedom of the outlaw;—an immediate
omplete loss of all personal rights and privileges of
aw followed. The outlaw amittit legem terræ, and
l not hold land, nor sue or defend in a civil or cri-
l action, nor give evidence, or act as a juryman.[1]
e consequences affect his right to make an entail;
ıe statute 1685, c. 22, specially declares, that it shall
ıwful to his Majesty's "subjects" to tailzie their
, &c., thus bestowing a special and statutory power
ecute a peculiar species of conveyance. The out-
ould not have enforced the obligations in the trust

The title on this entail had hitherto been on the
pt in the disposition by the trustees. But, suppose
tle had been to be completed by resignation, could
Crown have been required to grant a charter upon

[1] Reg. Maj., c. 12; Quon. Attach., c. 18; Balfour's Prac. 515; Mackenzie, 177; 1567, c. 33; Lowthian's Forms, p. 144; 2 Hume, 82, 2d edit., and p. 280, 3d edit.; Stair, b. ii. tit. 4. s. 61., b. iv. tit. 3. s. 10., and b. iii. tit. 3. s. 26; Instit., lib. i. tit. 1. s. 20; Stair, b. iv. tit. 9. s. 1; Balfour, 483; M'Kenz. Observ., p. 131, Dirleton v. Mackenzie; Ersk. b. ii. tit. 5. s. 66; Bank. ii. 427; Alison's Prac. of Criminal Law, 350.

Appellant's Argument.

no right to apply by petition to the Court of Session its registration. The question upon this point had n fully discussed in the other case between the ellant and respondent, and he therefore begged e to refer to that argument.

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ORD CHANCELLOR.—This case, which was heard parte, is one of great importance to the parties, and aises a new question in the law of Scotland. The umstance that it was only argued on one side, makes e duty of the House to be very explicit and careful to the course which your Lordships should pursue. ir Lordships have no information how it happens : the judgment of the Court below, in which fourteen ges[1] of the Court of Session concurred, is not supted by the party in whose favour that judgment was nounced. But there are interests to be protected, confined to those who are the parties to this proling, but the interests of parties not yet in being, may become entitled under the entail now in tion. Care is also requisite not to lay down any of law which may operate upon other interests in r cases, by giving effect to that which is contended he appellant to be the rule of law in Scotland in ect to the question here raised.

he facts, in so far as necessary to make my obsernis intelligible, are shortly these: In July 1790 a y, then fee-simple proprietor of an estate, being ged with the crime of murder, and not appearing, erwent a sentence of fugitation, and was put, according he expression of the law of Scotland, to the horn, by ch he incurred certain penalties, and was denounced

[1] Including Lord Craigie, who died before the final decree.

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as an outlaw and fugitive. Previously, however, to the proceedings which gave rise to that process, and on the 8th of May of the same year, he had executed a disposition of his estate, of which he was absolute owner in fee, to certain persons in trust. He did not at the time execute any declaration of trust, but he parted with his legal title to the estate previous to the time when he incurred the disability arising from the sentence of fugitation by being put to the horn.

In the year 1793, after the criminal sentence of outlawry had been enforced, the trustees executed a declaration of trust, by which they declared that the property had been conveyed to them upon trust, to abide the disposition of the author of the deed of May 1790. At a subsequent period, under a mandate of the original owner of the estate, then labouring under such incapacity as was the consequence of the proceedings taken against him, an entail was executed, under which the defenders, as substitute heirs, claimed. The heir of entail, the eldest son, (the father, maker of the entail being now dead,) claims the estate unfettered by such entail, in respect of his father's alleged incapacity at the time to exercise such an act of proprietorship.

When the cause was argued in the court below it was thought to involve principles of such importance and novelty that the whole judges gave their opinions upon the case. Thirteen judges gave a final opinion, but there was also Lord Craigie, who had been a judge in the earlier steps of the cause, but who had died before the final decision; and they all concurred, but not for the same reasons, that the pursuer had no title to the relief he prayed for.

Now it is to be observed, that, prior to any process taking place from which the incapacity of the maker of

this entail is to be inferred, he had parted with the legal right to the fee of the estate. It is also clear, from the very terms that are used, and from all the authorities cited, that the effect of what did take place was a forfeiture of all his goods and moveables; and, in addition to this, there is, undoubtedly, not properly a forfeiture, but an escheat of the life estate;—the life-rent escheat, as it is called, not going to the Crown as a forfeiture, but going to the superior of the fee, on strictly feudal grounds:—the party fugitate or outlawed being incapable to render the services of a vassal, the overlord is considered entitled to adopt some other person in the outlaw's place during the life of the outlaw.

So far there is no dispute as to the rule of law in Scotland. The appellant, however, contends that beyond this there is a forfeiture of the fee itself, and hence that his father had actually, by force of the sentence, been divested of his fee; and of course, if he had been divested of his fee, and of all interest therein, then he could not have done that which was the apparent effect of the deed which he executed. After looking into all the authorities cited in the printed papers, and at the bar, in support of the proposition that the effect of these proceedings was a forfeiture of the fee, it appears to me that there is no doubt whatever, that that proposition cannot be maintained. All the authorities cited prove that a life-rent escheat only takes place, and that the fee remains in the outlaw. In this proposition all the judges concur; and there are several admitted incidents to this state of the property in Scotland, which show that that of necessity must be the effect of the operation of the outlawry,

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and that it does leave the fee in the outlaw. After the death of the outlaw it is admitted that the heir may proceed to complete his title by service to the outlaw. It is also admitted, on the part of the appellant, and cases referred to do establish, that after this life-rent escheat has taken place, which according to the doctrine of the appellant would divest the outlaw of the fee, if that outlaw, being an outlaw only by process of fugitation, afterwards commits treason, he forfeits the fee; that is to say, he forfeits what was left in him notwithstanding the life-rent escheat. If by prior proceedings the fee had gone out of him, there would be no possibility of a subsequent conviction of treason operating as a forfeiture of the fee. But it is not in dispute that that is the effect of a conviction for treason subsequently to the taking effect of the life-rent escheat.

It is also an admitted proposition, supported also by authority, that notwithstanding the life-rent escheat the outlaw is competent to give effect to onerous burdens upon his estate. It is also assumed that the estate remains in him, otherwise, if the estate had gone out of him, whatever might have been the right of the creditors, he the outlaw would not have had it in his power to give effect to any interests that might have operation against the fee itself.

I apprehend therefore, that your Lordships can entertain no doubt as to the correctness of the unanimous opinion of the fourteen judges, that notwithstanding the outlawry and the life-rent escheat, the fee remains in the outlaw.

But then, it was said, that although that be so, yet inasmuch as he is what the law calls civiliter mortuus, or in other words amisit legem, he has lost all the

advantage and privilege which the law could confer upon him, and that therefore, he is not competent to deal with that property which it is clear remained in him. Now Baron Hume and Mr. Alison enumerate the consequences of outlawry and being put to the horn, but neither of these authors on the criminal law of Scotland specify, among these, an incapacity to dispose of what remains vested in the outlaw. It is perfectly true, that the personal incapacity which he has incurred prevents him from appearing in any court of justice, or doing any thing which requires the interposition of a court of justice in his behalf, but there is no authority to show that he cannot execute a valid deed respecting that which by law is left in him.

Now, in this case nothing was necessary towards completing the title, so that no feudal objection exists to the deed subsequently executed. He does not appear in any court or require the assistance of judicial authority. The trustees were the legal owners; and the only question is, whether, as between the author of the trust and the heir, the former can, as against the heir, effectually destine the fee. That there is estate sufficient to be so dealt with is beyond all question, and accordingly the power of the trustees is equally clear.

The distinction betwixt the effect of diligence by horning in civil process and outlawry criminally was much discussed; but it is admitted that putting to the horn in civil process does not produce this incapacity; and yet outlawry is not in Scotland as in England in criminal cases equivalent to conviction, but both in civil and in criminal cases it is only a process for the purpose of compelling appearance. To me it seems needless to inquire how far these two processes are now the same. Many altera-

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tions have been introduced by the special statute, b[illegible] no authority has been adduced to show that as to t[illegible] point the outlawry in criminal cases differs from t[illegible] same proceeding in civil diligence.

The judges below agree that the entail was good, an[illegible] that it was not competent to the appellant to get quit [illegible] it. Of the thirteen judges who gave their opinions [illegible] the last decision of the case all agreed that the fe[illegible] remained in the outlaw; nine[1] of them being of opinio[illegible] that the outlaw had full dominion over the fee; four[2] thought that in this case he had properly and effectuall[illegible] exercised that dominion, upon the ground that the pro[illegible] perty was in trust, and therefore that it did not refus[illegible] the interposition of a court for the purpose of giving [illegible] effect to the disposition of the property. Nine of th[illegible] judges were of opinion that there was no difference [illegible] between the powers in criminal and in civil cases.

What your Lordships have now to consider is no[illegible] whether the several opinions entertained by the learne[illegible] judges be correct or not, the sole question being whethe[illegible] the appellant has made out a case showing satisfactoril[illegible] that the opinion of all the judges in the Court of Sessio[illegible] was wrong, because, whatever grounds those learne[illegible] judges may have had for the conclusion to which th[illegible] came, the question is whether your Lordships ha[illegible] before you such grounds as will satisfy you that th[illegible] judgment ought to be reversed. Without going throug[illegible] the nice distinctions which have occupied so muc[illegible] discussion below, there are two grounds on which it appears to me that the judgment of the Court below is

[1] Lords Justice Clerk, Balgray, Gillies, Meadowbank, M'Kenzie, Medwyn, Corehouse, Fullerton, and Jeffrey.

[2] Lords President, Glenlee, Moncreiff, and Cockburn.

right. First of all, I consider it quite clear that notwithstanding what has taken place the fee remains in the outlaw, and that his personal disability has not been proved to apply to directing a trust previously vested in trustees. That exhausts the questions as they exist under the first appeal.

The second case in which an appeal has been presented was a suit for the purpose of reducing and getting rid of that which was done with the estate by the trustees under the mandate from the outlaw. Now if the appellant is wrong on the merits, if the entail be good as against him, he has no interest in the second question, inasmuch as the entail being valid, it is immaterial as between the heir and the maker of it, whether the recording was valid; an unrecorded entail being effectual inter hæredes, although not betwixt them, as with third parties, onerous creditors. But it appears to me that there is no ground whatever for the objection to the recording. The trustees are the parties who appear as owners of the estate; the outlaw does not appear; he is no party to the proceedings; the trustees are indeed acting under his mandate executing a duty he requires them to perform; but for all feudal purposes they are the owners of the estate, and so dealing with it. No irregularity is pointed out, and no case has been made to show that any of the proceedings have been illegal so far as the trustees are concerned.

If therefore your Lordships concur in the opinion I have expressed, that the entail itself was good, and that the heir was barred of his right, as fee-simple proprietor, by the entail so carried into effect by the trustees under the mandate of the outlaw, your Lordships will have no difficulty in concurring with the judgment of the Court

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of Session, that no objection can be made by the heir against the recording of the entail.

If there had been more difficulty in the case, and if, upon the papers before you and the arguments at the bar, real doubt had arisen as to the propriety of the judgment below, no doubt your Lordships would have regretted that you had to come to an adjudication upon the case without the benefit of hearing the argument for the defenders. But from the appellant's own case, as made by himself, and the authorities he has been compelled to refer to, and from that glimmering only of the defenders case which is to be seen in the papers of the appellant, who refers only to the arguments on the other side with the view of repelling them, I entertain no doubt that the judgment of the Court below ought to be affirmed.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and the same is hereby affirmed.

ARCHIBALD GRAHAME, Solicitor.

[16*th July* 1839.]

(Appeal from the Court of Session, Scotland.)

WILLIAM DUNLOP and Company, Appellants.[1] No. 22.

[*Sir William Follett.*]

GEORGE ANTHONY LAMBERT and others, Respondents.

[*Attorney General* (*Campbell*)—*James Anderson.*]

Carrier—Contract—Risk.—In an action by consignors for value of a puncheon of whiskey thrown overboard, and lost, against ship owners, who by bill of lading acknowledged the shipment of the goods in good order and condition, "to be delivered in the like good order at New-"castle," dangers and accidents of the sea excepted, and which bill of lading the consignors transmitted to the consignee, with an invoice of the price, including the amount of freight and of the insurance paid by consignors, and charged against the consignee,—the consignors libelled a contract by the ship owners to deliver the goods at Newcastle, and also an agreement by the consignors to be answerable to the consignee for the safe delivery of the goods. The judge at the trial directed the jury in point of law, "That as it appeared that the pursuers at the time "of furnishing the spirits in question had sent an invoice "thereof to the purchaser, bearing that the same had "been insured, and that the freight thereof and insurance "were charged against the said purchaser in the invoice, "the pursuers were not entitled in law or interest to "recover the value of the said puncheon from the de-"fenders:"—Held (reversing interlocutor of the Court of

[1] 15 D., B., & M., 884. 1232.

Session, which disallowed an exception to said direction, that said direction was in point of law not correct in the mode in which it left the case with the jury,—in respect that it withdrew from their consideration the fact whether the goods had been delivered to the carriers on the risk of the consignors or of the consignee, and the question whether there was a special contract between the consignors and consignee sufficient to enable the consignors to recover in the action.

1st Division.

Lord Ordinary Fullerton.

ON the 31st of August 1833 the appellants, who are wholesale spirit merchants, sent to the agents at Leith of the respondents, who are ship owners, a puncheon of spirits, to be carried to the purchaser, Mathew Robson, near Newcastle, and a bill of lading was granted by the respondents agents to the appellants in these terms:—

"Mr. Mathew Robson, Collier Row, by Houghton-le-Spring, No. 1969, 105 gs. care of Mr. Lattimer, Newcastle.

Shipped by William Dunlop & Co., in good order and condition, in and upon the good ship Ardincaple, whereof Macleod is master for the present voyage, and now lying in the port of Leith, and bound for Newcastle, one puncheon of spirits, bung-full, with excise permit, being marked and numbered as in the margin, and to be delivered in the like good order, and well conditioned, at the foresaid port of Newcastle, (all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature and kind, excepted,) unto Mr. Mathew Robson, Collier Row, by Houston-le-Spring, or to his assigns, freight for the said goods being paid by William Dunlop & Co. at primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to

"To be taken out in running days after ship's arrival, or to pay guineas per day demurrage.

" bills of lading, all of this tenor and date, one of " which being accomplished, the other to stand void. " Dated in Leith, 31st August 1833.

" (Signed) *Laing* and *Sword*, Agents."

The appellants transmitted to Robson, along with the bill of lading, an invoice, and a letter (in part), in the following words:—

" Mr. Mathew Robson, Edinburgh, 31st August 1833.

" Bo^t^ of William Dunlop & Co.

" Rectified British Spirits and Compounds.	One puncheon malt aqua, fine quality, W.D. & J.B.,	
" No. 1369, — 105 g. 11 O. P. are		
" 116 gs. p. 12*s.* 9*d.* - -	£73	19 0
" To freight paid to Newcastle, 10*s.*;		
" insurance, ½ per cent. - -	0	18 0
" Puncheon with spirits not to be re-		
" turned - - -	1	0 0
	£75	17 0

" Mr. Mat. Robson, Edinburgh, 31st August 1833.

" We hope the above will reach you in time and " give satisfaction. We reckon the quality very fine, " and we trust this will be the introduction to many " good transactions between us both. For amount, we " enclose our draft at three months, payable in London, " which please return us accepted and domiciled on " approval of the shipment. The spirits will be in " Newcastle on Monday morning if all is well, and " your farther orders will very much oblige yours " respectfully, *Wm. Dunlop* & Co."

In the manifest of the cargo of the Ardincaple, there was the following entry:—" Consignee, Mathew Robson; " residence, Newcastle; goods, marks, &c., one puncheon

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Statement.

"whiskey, freight paid, 10*s.*; amount total invoice, "75*l.* 17*s.*"

The goods having been lost, and not delivered, the appellants brought an action against the respondents for the value thereof; and (by their amended summons) libelled, "that upon the 31st day of August last the pur- "suers shipped on board the steam ship or vessel called "the Ardincaple of Newcastle, then lying at the port "of Leith, and bound for Newcastle, one puncheon of "spirits, bung-full, with excise permit, marked W. D., "No. 1369, 105 gs.; addressed to Mr. Mathew Robson, "Collier Row, by Houstoun-le-Spring, care of Mr. Lat- "timer, Newcastle, to be delivered in good order and "well-conditioned, at the aforesaid port of Newcastle, "as addressed, conform to memorandum, receipt, or "bill of lading granted by Messrs. Laing and Sword, "agents at Leith for the owners of the said steam ship "or vessel, bearing date the said 31st day of August "last, and acknowledging that the freight for the said "goods was paid, to be produced in process, and here "referred to, and held as repeated brevitatis causa; the "pursuers at the same time having undertaken by their "agreement, and being answerable to the said Mathew "Robson for the safe delivery of the said puncheon;" and the conclusion was for payment of the value of the goods to the appellants.

The respondents, among other defences, objected to the title or interest of the appellants to sue for and recover the amount (the said defence being designated preliminary). The Lord Ordinary pronounced the following interlocutor, disposing of the preliminary character of the said defence:—

"20th June 1835.—Lord Fullerton. Having heard

parties procurators, finds that the averments of the pursuers are relevant to support their title and interest to insist in the present action, and therefore repels the preliminary defences as urged in bar of further procedure in the action, and appoints issues to be prepared in common form upon the matter in dispute."

The cause then went to trial on the following issues:

"1. Whether on or about the 31st day of August 1833 the pursuers shipped a puncheon of spirits on board the Ardincaple of Newcastle, a vessel belonging to the defenders, for the purpose of being conveyed to Newcastle, and delivered to Mathew Robson, Collier Row, Houghton-le-Spring, care of Mr. Lattimer, Newcastle? And 2. Whether the defenders wrongfully failed to deliver the said puncheon to the said Mathew Robson, and are indebted and resting owing to the pursuers in the sum of 75*l.* 17*s.* or any part thereof, with interest thereon, as the value of the said puncheon of spirits."

The case came on for trial before the Lord President and a jury, on 21st March 1837. The appellants, among other evidence, adduced the deposition of Robson, who stated that he believed that the loss of the said puncheon was sustained by Messrs. Dunlop.

The respondents led no proof, and admitted the shipment, the loss and non-delivery, and amount of the claim, as stated.

The judge directed the jury that "the pursuers appeared to be entitled to a verdict upon the first issue, and that the only question in dispute related to the second issue; and did direct the said jury in point of law, that as it appeared that the pursuers, at the time of furnishing the puncheon of spirits in question,

allowing the bill of exceptions, and refusing to ant a new trial:—" Edinburgh, 30th June 1837.— The Lords, after hearing counsel for the parties, disallow the bill of exceptions in this case; refuse the motion for a rule to shew cause why a new trial should not be granted; Find the defenders (respondents) entitled to expenses since the date of trial; appoint an account thereof to be given in, and remit the same to the auditor to be taxed and to report."

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Judgment of Court, 30th June 1837.

The court subsequently pronounced judgment, and arded expenses, by the following interlocutor:— Edinburgh, 6th July 1837.—The Lords having heard parties on the motion of the defenders (respondents), apply the verdict, assoilzie the defenders, find expenses due, subject to modification, appoint an account thereof to be given in, and remit the same to the auditor to be taxed and to report."

Judgment of Court, 6th July 1837.

Dunlop and Co. appealed.

It has become unnecessary to repeat the arguments duced, and authorities founded on, by the appellants d respondents respectively, in so far as they bear upon judgment, the same having been fully explained the Lord Chancellor in moving the judgment of the use of Lords.

LORD CHANCELLOR.—My Lords, this case of Dunlop Co. v. Lambert is an appeal from an interlocutor of e Court of Session disallowing a bill of exceptions taken the direction of the Lord President on the trial of issue between the parties in the cause. The case ose out of the firm of Dunlop & Co. having sent a

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"the defenders, for the purpose of being conveyed "to Newcastle, and delivered to Mathew Robson, "Collier Row, Houghton-le-Spring, care of Mr. Lat- "timer, Newcastle? And, secondly, whether the defen- "ders wrongfully failed to deliver the said puncheon "to the said Mathew Robson, and are indebted and "resting owing to the pursuers in the sum of 75*l.* 17*s.* "or any part thereof, with interest thereon, as the "value of the said puncheon of spirits?"

One question raised upon the appeal was, how far the liability of the defenders to the pursuers was put in issue by the mode in which these issues were directed, it being stated that it had been made a matter of defence that the pursuers were not the right parties, and that that question was not intended to be included in the trial of the issue; certainly, that point was raised upon the pleadings, and I apprehend it is equally clear that the point was left open upon the issues. The second issue was, "Whether the defenders wrongfully failed to deliver the said puncheon to the said Mathew Robson, and are indebted and resting owing to the pursuers in the sum of 75*l.* 17*s.* or any part thereof." It is quite obvious that if it was not intended to leave that question of the legal liability open it would not have been laid in those terms; it would have been sufficient to direct a trial of the first issue, whether the pursuers had shipped a puncheon of spirits on board the vessel, and whether it was lost by the defenders having wrongfully failed to deliver the said puncheon of spirits; but the latter part of it, whether the defenders were indebted and resting owing to the pursuers in the sum of 75*l.* 17*s.* or any part thereof, with interest thereon, as the value of the said

" being paid by William Dunlop and Co. at primage " and average accustomed."

The invoice stated the property in these terms: " One " puncheon of spirits," giving the description, " 73*l.* 19*s.*; " to freight paid to Newcastle, 10*s.*, insurance, half per " cent., 18*s.*; puncheon itself, 1*l.*; making 75*l.* 17*s.*" That was accompanied by a letter written by Dunlop & Co. to Robson, in these terms: " Owing to our young " friend John Dunlop having met with a rather serious " accident by a fall from or a crush by a gig, in the " country, where he is still, not being in a state to be " removed for a day or two, the above has been too " long in being forwarded, as your friend's letter was " locked up in his desk, and we did not know till last " night by a note from him that it was to be forwarded " at all; we hope it will reach you in time and give " satisfaction; we reckon the quality very fine, and we " trust this will be the introduction to many good " transactions between us both; for amount we enclose " our draft at three months payable in London;" the draft being 75*l.* 17*s.*; and in the manifest of the cargo ntered " Consignee, Mathew Robson; one puncheon whiskey, freight paid, 10*s.*; letter written, 8th October; 75*l.* 17*s.*"

My Lords, on the trial of these issues before the Lord resident, Robson's deposition on oath, which had been aken under a commission, was, along with other evidence, submitted to the jury; after which the Lord President directed the jury in these terms: " The Lord " President observed that under the admissions made " by the defenders counsel the pursuers appeared to be " entitled to a verdict upon the first issue, and that the " only question in dispute related to the second issue;

perfectly true, generally speaking, without regard to any special circumstances which may arise, that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is the risk of the consignee. If a party directs property to be sent by a particular carrier no doubt he becomes his agent, and the decisions go to this,—that if, without designating the particular carrier, he directs that it shall be sent in the ordinary course, the delivery by the consignor to the carrier relieves him from all responsibility, and the delivery to the carrier is considered as a delivery to the consignee.

On reference, however, to the authorities it will be found that although that is the general inference, and where nothing particular passes, that it is universally true, it is capable of variations. If a particular contract be proved between the consignor and the consignee,—and it does not follow that the circumstance of the freight and the insurance being paid by the one or the other is to be considered a conclusive evidence of the ownership,—as notwithstanding the ordinary rule, of course there may be special contracts;—where the party undertaking to consign undertakes to deliver at a particular place, and if he undertakes to deliver at a particular place, the property, till it reaches that place, and is delivered according to the contract, is at the risk of the person consigning; so although the consignor may follow the directions of the consignee, and deliver the property to be conveyed, either by a particular carrier or in the ordinary course of business, still the consignor may make such a contract with the carrier as will make the carrier liable to him. There are, therefore, an infinite variety of circumstances which may occur in which the ordinary rule will turn out not to be the rule to regulate

shop price, the price which the vendor of the goods expects to receive, and which, at all events, he expects to receive; if any person comes to his warehouse at Edinburgh, and purchases goods, he charges the price of course at which he is willing to sell his goods, but if the party buying lives at a distance, there must be, in addition to the price of the goods, the price of the carriage,—that must be paid by somebody,—and there must also be the insurance if the party is to be protected against loss; so that it comes to the same thing, both to the consignor and the consignee, whether the consignor sells at the shop price, leaving the consignee to pay the freight and insurance, or whether the consignor sells at the shop price with the addition of the expense of the freight and insurance. In both cases the same sum will be paid by the party receiving the goods; and the vendor of the goods will have to receive the same sum of money as the price of the article he sells. Now, all that the invoice proves is, that the sum total to be paid by the consignee was the shop price, 73*l.* 19*s.*, and the cost of the freight and insurance.

My Lords, this does not rest on general principles only, for it has been the subject of several adjudicated cases. I would again call your Lordships attention to the summons, which states two grounds: first, the special contract with the carrier, by which he agreed to deliver at Newcastle; and then it states the fact, that, as between the consignors and the consignee, the consignors were under an undertaking to deliver the spirits at Newcastle. If the latter fact had been proved there could not have been any question that the consignee had nothing to do with the goods until they arrived at Newcastle, and were actually delivered to him there; and if

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that contract existed it ought to have been admitted to proof. Possibly it might not have been proved to the satisfaction of the jury, but it appears that the Lord President withdrew that question from the jury, and did not leave it to them to say whether Robson was to be believed or not, but finding on the invoice that the consignors had paid the freight and insurance, and charged them to Robson, the consignee, who no doubt was the person on whom those charges must ultimately fall, as in one way or other they must be added to the price of the goods before he could see what they had cost him, his Lordship directed the jury in point of law that they must find for the defenders.

My Lords, in order to prove that notwithstanding the ordinary right of the consignee to bring an action against the carrier for the loss of the goods he has undertaken to convey,—that notwithstanding that being the general rule, the right of action and the liability may be varied by special contract entered into between the consignor and the consignee, and that the payment of insurance by the one or the other is not conclusive evidence, I would refer to three or four cases in which that doctrine is very clearly established.

The first case in point of date, my Lords, is Davis and Jordan v. James, in 5 Burrow, 2680, in which the statement was that the vendors the manufacturers had delivered goods to a carrier, who undertook to carry for a certain price, and to deliver at a certain time. The action was brought, in consequence of the goods being lost, by the consignor, and it was contended that the consignee was the party who ought to bring the action. Lord Mansfield says, "there was neither law nor conscience in the "objection. The vesting of the property may differ ac-

ording to the circumstances of cases, but it does not enter into the present question. This is an action upon he agreement between the plaintiffs and the carrier; he plaintiffs were to pay him, therefore the action s properly brought by the persons who agreed with im and were to pay him." In this case there is no bt that the consignors were the persons to pay. The of lading itself states that Dunlop & Co., the con-ors, had paid, and the contract was that they should er the goods at Newcastle.

y Lords, the next case in point of date is the of Moore v. Wilson, 1 Term Reports, 659; the on was by the consignor; the declaration stated, the defendant undertook to carry the goods "for a ertain hire and reward, to be paid by the plaintiff," ch the defendant's counsel contended did not prove the laration. That agreed with the view of Mr. Justice ler, who nonsuited the plaintiff, whereupon a motion a new trial was made, and Mr. Justice Buller said he mistaken the law, for "that whatever might be the ontract between the vendor and the vendee, the greement for the carriage was between the carrier nd the vendor, the latter of whom was by law liable." A case was referred to, Dawes v. Peck, in 8 Term orts, 330, in support of the law as laid down by the d President. In that case the consignee had directed goods to be sent by a particular carrier; and the rt, holding that the consignor, by delivering the ds to the carrier so designated, had parted with the perty, held that he could not maintain an action.

The same doctrine was laid down in another case, ere there was a mere delivery to a carrier without any ticular contract between either the consignor and

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the consignee, or between the consignor and the carrier. In Dulton v. Solomons, in 3 Bosanquet and Puller, at page 584, Lord Alvanley, C. J., says, "if a "tradesman order goods to be sent by a carrier, though "he does not name any particular carrier, the moment "the goods are delivered to the carrier it operates as a "delivery to the purchaser;—the whole property imme- "diately vests in him, he alone can bring an action "for any injury done to the goods," which, no doubt, is the rule in those cases where there are no particular circumstances proved, or any particular contract in evidence between the plaintiff and defendant. In Sergeant v. Morris, in 3 Barnewell and Alderson, 277, goods being shipped, under a contract to deliver them in the consignor's name to the consignee, and it appearing that they were at the consignor's risk, it was held that the consignor might sue although the consignee had insured the goods. That is exactly the converse; ordinarily speaking, the consignee would be the person to bring the action; there the consignor brought the action, and it was held that he was right in bringing the action, because he undertook by contract that he would deliver the goods to the consignee at a particular place, but the consignee had insured. Now here, according to the Lord President, that fact would have been put aside, and the party insuring would have been the party to bring the action, but the reverse was held in that case, and though the consignee had insured, it was held that the consignor was the right person to bring the action.

In Brown v. Hodgson, in 2 Campbell's Nisi Prius Cases, page 36, the bill of lading stated that the goods were shipped by order and on account of the consignee; Lord Ellenborough held that the consignor could not in

ase bring an action, because upon the evidence it red that he had nothing to do with them; the bill of ; stated the contract with the carrier to deliver the at a certain place to the consignee, and stated that oods had been shipped for and on account of the nee. The production of that letter, unexplained y other evidence, was considered by Lord Ellenbo- conclusive that the consignor had parted with all roperty in the goods, and that the consignee alone bring an action.

t in the same volume, 2 Campbell's Nisi Prius Cases, 339, in King v. Meredith, where the action was by nsignor against the consignee, for the price of the lost in the carriage, it appeared that the consignor pay the carriage, and it was objected that the goods herefore at his risk, so that he could not maintain ion against the consignee. It was said he could aintain the action because his paying the carriage nclusive that the goods were at his risk. Mr. Justice nce says, "The mode in which the carrier was to aid makes no difference. The moment the spirits e delivered to him the property vested in the ndant; the plaintiffs, by paying the carrier, did become insurers of the spirits while in the hands he carrier." There, again, is a fact which, ac- g to the law as laid down by the Lord President, have been conclusive, but in that case the court d that the right might be in one party, where the party had paid the freight.

re is a case very strongly applicable to the pre- the case of Joseph v. Knox, in 3 Campbell's rius Cases, 320; that was an action against the of a ship, on a bill of lading signed by the master,

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for not carrying goods from London to Surinam. The bill of lading stated that the goods were shipped by the plaintiffs, that they were to be delivered in Surinam to Levy Davids or his assignees, and that the freight was paid in London. The goods consisted chiefly of butter, which the plaintiffs had received from merchants at Amsterdam to be forwarded to Levy Davids in Surinam, and which, in answer to a bill in equity, they swore they believed to be his property. For the defendant it was insisted that this action could not be maintained by Joseph & Co., who had no interest in the goods; they were merely the conduit through which the goods were to be transmitted from the merchants at Amsterdam to Davids at Surinam. The property being in Davids, the consignee, he alone was injured by the nondelivery of the goods, and he alone could sue to recover their value. It has often been decided that an action against a common carrier for the loss of goods must be brought by the purchaser who ought to receive them, and not by the vendor who had delivered them to the carrier. There the vendor delivers them merely as the agent of the purchaser, and on that ground can maintain no action respecting them. Lord Ellenborough laid down the law as the law:—"I am of opinion that this action was "lies; there is a privity of contract established between "these parties by means of the bill of lading. The "states that the goods were shipped by the plaintiffs; "and that the freight of them was paid by the plain- "tiffs in London; to the plaintiffs, therefore, from "whom the consideration moves, and to whom the "promise is made, the defendant is liable for the non- "delivery of the goods. After such a bill of lading

has been signed by his agent he cannot say to the shippers they have no interest in the goods, and are not demnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner."

The same question arose between other parties in a nilar case [1], and Lord Ellenborough again laid down e same doctrine.

These authorities, therefore, my Lords, established se propositions: that although, generally speaking, ere there is a delivery to a carrier to deliver to a signee, the consignee is the proper person to bring action against the carrier if they should be lost; the consignor may have a right to sue if he made ecial contract with the carrier, and the carrier has ed to take the goods from the consignor and to er them to any particular person at a particular place, ch special contract supersedes the necessity of showing ership in the goods; and by authority of the case avis v. James [2], and the last case of Joseph v. Knox [3], the consignor is enabled to maintain an action, gh the goods may be the goods of the consignee.

ut the authorities also go to this: that although narily speaking the consignee would be the party ring the action, yet that the consignor also is en- d where there is a contract to deliver at a particular e, if the risk is in the consignor; and therefore circumstance of the paying freight or the paying rance, though it is a circumstance to be taken into sideration, as it is not conclusive on the question

[1] Van Omeron v. Dowick, 3 Camp. 322.

[2] 5 Burr. 2680. [3] 3 Camp. 320.

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of property, so it is not conclusive of the right to sue. The Lord President laid down that, in his opinion, it was conclusive, and therefore he shut out the proof of the fact. I think, therefore, that there are two objections to the mode in which the Lord President left the case to the jury; namely, that he withdrew from their consideration that which ought to have been submitted to their consideration,—I mean the fact whether the goods had been delivered to the carrier on the risk of the consignors or of the consignee; and the question whether there was a special contract between the consignors and the consignee, which in its circumstances would have been sufficient to enable the pursuers to recover in the action. It is not necessary for your Lordships to inquire in what form that ought to be left to the jury, the questions on the bill of exceptions being whether the direction of the judge was in point of law correct. I am of opinion that it was not correct in the mode in which it was left to the jury, and that your Lordships ought to reverse the interlocutor disallowing the bill of exceptions, and direct that a new trial be granted.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal be and the same are hereby reversed: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, with directions to allow the bill of exceptions, and to grant a new trial, and to determine all questions of expenses between the parties in the said Court of Session, and to proceed otherwise in the said cause as shall be just, and consistent with this judgment.

DEANS and DUNLOP — JOHNSTON and FARQUHAR, Solicitors.

[18*th July* 1839.]

(Appeal from the Court of Session, Scotland.)

ALEXANDER PEARSON and WILLIAM ROBERTSON, Appellants.[1] (No. 23.)

[*Pemberton — John Stuart.*]

Miss JANE CASAMAIJOR and others, Respondents.

orney General (Campbell) — Lord Advocate (Rutherfurd).]

Et è contra.

acy — Testament — Vesting. — A testator, by a trust disposition and settlement, directed his trustees, after payment his debts and the expenses of the trust, 3dly, to pay legacy of 500*l.* to his sister Mrs. A.; 4thly, to pay annuities of 400*l.*, 400*l.*, and 200*l.*, to his other three sisters, during their respective lives, which several annuities were appointed to be paid half-yearly during the lives of his said sisters respectively; and in the event that after payment of his debts and obligations due at his death, payment of the expenses attendant on the execution of the trust, and of the 500*l.* to his said sister Mrs. A., the residue of the proceeds of his funds and estate should be sufficient for yielding the foresaid annuities thereby provided on his said sisters, then it was his meaning and intention that the said residue, whatever it might be, should be vested and laid out, and the interests or dividends arising therefrom be paid unto and divided among the said three sisters, Mrs. F., Mrs. P., and Mrs. B., during their respective lives, in the same proportions, and exactly on the same terms, in every respect, as therein pointed out, in respect to the full annuities of 400*l.*, 400*l.*, and 200*l.*; 5thly, in the event of there being any of the proceeds of his said funds and estate remaining, after setting apart capital sums sufficient to yield the three annuities of 400*l.*, 400*l.*, and 200*l.*, then his said trustees should pay such

[1] Rep. 15 D., B., & M., 275.; F. C. 16th Dec. 1836.

surplus, together with the capital sums so to be set apart for answering the foresaid annuities, as and when such capital sums should become tangible by the deaths of the said annuitants respectively, or in the event of there being no surplus, then the capital sums, whatever their amount might be, so to be vested and laid out as aforesaid, as and when such capital sums should become tangible as aforesaid, to and among Mary, Helen, Alexander, and Mary Ann, children of Mrs. P., and to three daughters of Mrs. B., equally among them, share and share alike, and the survivors or survivor of them, and that at the first term of Whitsunday or Martinmas after their respectively attaining majority or being married, whichever of these events should first happen, or as soon after the first of these events as the said capital sums so to be set apart should become tangible, by and through the deaths of the said several annuitants respectively, declaring, that until such several shares became payable, the interest or dividends of each share should be payable to the above-named persons respectively, for their maintenance and education, with full power to advance the whole or part of the share of A. P. for his outfit; and in the event of the deaths of any one or more of the said seven residuary legatees, before the term of payment (one or more, as the case might be,) of their shares as aforesaid, but that such deceasers should leave issue in life, and in life at the time that their father or mother would have been entitled to have received payment of their shares had they survived, the share of such deceasing parent should belong and be paid to and among their issue respectively, and that at the periods at which deceasing parent would have received the same had they been in life,—the trustees to regulate themselves accordingly, power being given to them to secure the shares falling to the seven legatees, so as all or any one or more of them shall only be entitled to draw the interest or dividends of their respective shares during their several lives, and the capitals of their shares shall in that case descend to their respective heirs, &c.; and 6thly, in the event that the residue of his funds, after payment of the 500*l.* to his sister Mrs. A., should amount to the sum of

15,000*l.* sterling or upwards, to pay out of such residue 1,000*l.* sterling to each of George and Thomas P., sons of Mrs. P.; but if such residue should be under 15,000*l.*, and should not be less than the sum of 8,000*l.*, then the said George and Thomas P. should only be entitled to 500*l.* each; but if such residue should not amount to the said sum of 8,000*l.*, then the said George and Thomas P. should not be entitled to receive any thing, the above-mentioned eventual legacies being to be payable to the said George and Thomas P. at the first term of Whitsunday or Martinmas after his death, with interest from said term of payment till paid. The testator was survived by his sisters Mrs. F. and Mrs. P., but not by Mrs. B. He was survived also by five of the legatees, including A. P. Mrs. F., one of the annuitants, died, predeceased by A. P. and M. P. A. P. had attained majority, and executed a general settlement in favour of Mrs. F. The free residue of the testator's estate exceeded 15,000*l.*, but the payment of the annuities before Mrs. F.'s death exhausted the annual income of it. In an action of multiplepoinding for fixing the interests of the several parties,—Held, 1. (affirming the judgment of the Court of Session, which affirmed a finding by the Lord Ordinary,) "that "the shares of the residue, so far as the same consisted "of capital sums set apart for answering the said an-"nuities, provided to the said A. P. and M. P. by the "fifth purpose of the trust, whereby the residue was "appointed to be paid to the seven individuals therein "named, share and share alike, and the 'survivors or "survivor' of them, under the conditions farther therein "expressed, were not so vested in the said A. P. and "M. P. as to enable them effectually to dispose thereof." Per L. C. There is sufficient upon the face of the trust deed to show that the term "survivor" does not refer to the period of the testator's own death, but that it refers to the period at which these sums would become tangible, and that would lead to an affirmance of the said finding. Held, 2. (varying the interlocutor of the Court of Session, and remitting, with a declaration,) that the legacies to G. P. and T. P. by the sixth purpose of the deed declared

were payable to them at the first term of Whitsunday or Martinmas after the testator's death; and that the sum applicable to the payment of the aforesaid annuities was the residue of the said trust fund, after deducting as well the testator's debts and obligations, the expenses of the trust, and the legacy of 500*l.* to Mrs. A., as the said two legacies payable to G. P. and T. P.

2D DIVISION.

Lord Ordinary Moncreiff.

BY a trust disposition and settlement, dated 16th April 1810, Alexander Porterfield esq., of Porterfield, now deceased, disponed to and in favour of Alexander Pearson esq. (the appellant), and of Frederick Fothringham esq., now deceased, his whole estate, real and personal, in trust, for the following, among other, purposes; after disposing of his whole property and paying his debts: Thirdly, to make payment of a legacy of 500*l.* to his sister Mrs. Camilla Porterfield or Alexander, wife of Boyd Alexander esq., of Southbar. Fourthly, to pay the following annuities to his sisters after named, during their respective lives, viz. to Mrs. Christian Porterfield or Fothringham an annuity of 400*l.*; to Mrs. Ann Porterfield or Paterson, wife of Lieutenant-Colonel Thomas Paterson, residing in Charlotte Square, Edinburgh, a like annuity of 400*l.*; to Mrs. Margaret Porterfield or Buchanan an annuity of 200*l.*, and this over and above and in addition to the annuity already settled on the said Mrs. Margaret Porterfield or Buchanan by him, which several annuities thereby provided the said Alexander Porterfield directed and appointed his said trustees to pay to his said sisters, during all the days of their respective lives, and that half-yearly, commencing payment thereof at the second term of Whitsunday or Martinmas which should happen after his death, for the year preceding such first terms of payment, and continuing payment thereafter at two terms in the year, Whitsunday and Martinmas a-

aforesaid, during the lives of his said sisters respectively; and for the better fulfilment of this purpose, he thereby directed his said trustees to vest and lay out capital sums for answering the foresaid respective annuities on any security or securities which they might think proper, either personal, heritable, or in the public funds, and to take said securities in such terms as they might think best adapted for fulfilling the foresaid purpose; and in the event that after payment of the said Alexander Porterfield's debts, and fulfilment of the obligations in which he might stand bound at the time of his death, payment of the expenses attendant on the execution of the trust and of the 500*l.* to his said sister Mrs. Alexander, the residue of the proceeds of his funds and estate should not be sufficient for yielding the foresaid annuities thereby settled on his said sisters,—then it was his meaning and intention that the said residue, whatever it might be, should be vested and laid out, and the interest or dividends arising therefrom be paid unto and divided among his said three sisters, Mrs. Fothringham, Mrs. Paterson, and Mrs. Buchanan, during their respective lives, in the same proportions and exactly in the same terms, in every respect, as before pointed out with respect to the full annuities of 400*l.*, 400*l.*, and 200*l.*; and he thereby directed his said trustees to regulate themselves accordingly. The fifth purpose of the trust was:—"In the event of there being any of the proceeds "of my said funds and estate remaining, after setting "apart capital sums sufficient to yield the three annui- "ties of 400*l.*, 400*l.*, and 200*l.*, as above specified, then "I hereby direct my said trustees or trustee to pay "such surplus, together with the capital sums so to be "set apart for answering the foresaid annuities, as and

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" when such capital sums become tangible by the deaths " of the said annuitants respectively, or, in the event of " there being no surplus, then the capital sums, what- " ever their amount may be, so to be vested and laid " out as aforesaid, as and when such capital sums shall " become tangible, as aforesaid, to and among Mary " Paterson, Helen Paterson, Alexander Paterson, and " Mary Ann Paterson, all children procreated of the " marriage between the said Lieutenant-Colonel Thomas " Paterson and Mrs. Ann Porterfield or Paterson, " Buchanan, Buchanan, and " Buchanan, all daughters of the said Mrs. Margaret " Porterfield or Buchanan, equally among the said " Mary, Helen, Alexander, and Mary Ann Patersons, " , , and Buchanans, share and " share alike, and the survivors or survivor of them, and " that at the first term of Whitsunday or Martinmas after " their respectively attaining majority or being married, " whichever of these events shall first happen, (under " the declaration however after mentioned,) or as " soon after the first of said events as the said capital " sums so to be set apart for answering the foresaid " annuities shall become tangible, by and through the " deaths of the said several annuitants respectively; " hereby declaring, that until such several shares become " payable the interest or dividends of each share shall " be payable to the above-named persons respectively, " for their maintenance and education; but I hereby " give full power to my said trustees or trustee to " advance the whole or any part of the principal sum " falling to the share of the said Alexander Paterson, " if they or he shall judge it necessary for his outfit or " establishment in the world; hereby further declaring,

that in the event of the deaths of any one or more of the said Mary, Helen, Alexander, and Mary Ann Patersons, or , , and Buchanans, before the term of payment (one or more, as the case may be,) of their shares, as aforesaid, but that such deceasers shall leave lawful issue of their bodies in life, and which issue shall be in life at the time their father or mother would have been entitled to have received payment of their shares had they survived, the share of such deceasing parent shall belong to and be paid to and among their issue respectively, and that at the periods at which such deceasing parents would have received the same had they been in life. But farther, it is hereby expressly provided and declared, and I do hereby direct and appoint my said trustees or trustee to regulate themselves accordingly, that it shall be completely in the power of my said trustees or trustee, if they or he shall think it proper so to do, to settle and secure the shares falling to all or any one or more of the said Mary, Helen, and Mary Ann Patersons, and , , and Buchanans, so as all or any one or more of them shall only be entitled to draw the interest or dividends of their respective shares during their several lives, and the capitals of their shares shall, in this case, fall and descend to their respective heirs, executors, or assignees." By the sixth purpose of the trust the trustees are directed, in the event of the residue of his funds and estate, after payment and fulfilment of debts and obligations, and of the legacy of 500*l.* to Mrs. Alexander, amounting to upwards of 15,000*l.*, to pay out of such residue the sum of 1,000*l.* to each of George and

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Thomas Patersons, sons of Lieutenant-Colonel Thomas Paterson; but if such residue should be under 15,000*l.*, and not less than 8,000*l.*, these two legacies were to be reduced to 500*l.* each; while, if the said residue should not amount to 8,000*l.*, the said George and Thomas Patersons were not to be entitled to receive any legacies at all; and which legacies were to be payable at the first term of Whitsunday or Martinmas after the testator's death, and to bear interest from the said term of payment till paid.

The testator died in the year 1815. Two of the three annuitants, Mrs. Fothringham and Mrs. Paterson, survived him. Of the seven residuary legatees five survived him, of whom Alexander Paterson was one. Alexander Paterson attained majority in 1818, and died in 1820, leaving a settlement of his whole property in favour of Mrs. Fothringham and husband, and the survivor of them. At that time both the annuitants were alive, but one of them, Mrs. Fothringham, died in 1834; the other annuitant, Mrs. Paterson, still survives. Upon Mrs. Fothringham's death Mr. Pearson (one of appellants), as trustee of Mr. Porterfield, raised an action of multiplepoinding and exoneration, in which several parties claimed. But the principal question related to the disposal of the capital sum that was disengaged by the death of Mrs. Fothringham. Mrs. Fothringham's trustees (Messrs. Pearson and Robertson the appellants) claimed to be ranked,—1, for arrears of annuity due to that lady at her death, and, 2, for Alexander Paterson's share of the fund, on the plea that his share had vested in him previous to his death, and was bequeathable by will. On the other hand, Miss Casamaijor and other legatees (respondents) re-

sisted the second part of that claim on the ground that the legacy to Alexander Paterson had not vested. The respondents objected also to the first part of that claim that Mrs. Fothringham's trustees had no right to the annuity subsequent to the last term before her death.

Mrs. Fothringham's trustees and Mrs. Paterson, two of the annuitants, further maintained that in ascertaining the amount of the income of the trust estate falling to the annuitants, the interest of the two legacies to George and Thomas Paterson ought not to be deducted from that income, but that the said two legacies, with interest due at the death of the annuitants, ought to be taken from the capital of the residue.

The questions raised upon the construction of the trust disposition are explained and disposed of in the following interlocutor (3d June 1836) by the Lord Ordinary, and in the relative note:—"The Lord Ordi-
"nary having considered the closed record, and heard
"parties procurators thereon, and made avizandum,
"Finds, primo, that as the trust deed, in the fourth
"article of the purposes thereof, expressly ordains the
"trustees to pay the annuities thereby provided to the
"three parties named, commencing the first payment
"at the second term of Whitsunday or Martinmas
"after the testator's death, and as the only event pro-
"vided for, whereby the amount of those annuities was
"to be diminished, is expressly the event, that after
"payment of the testator's debts and obligations, the
"expenses of the trust, and one legacy of 500*l.* to
"Mrs. Alexander, 'the residue of the proceeds of my
"'funds and estate shall not be sufficient for yielding
"'the foresaid annuities hereby settled on my foresaid
"'sisters,' the said annuitants were entitled to receive,

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" and the trustees were bound to pay, the full annuities
" so provided to them during their lives respectively, so
" far as the residue, after those deductions, were suffici-
" cient for the purpose; and finds, that their claim to
" such annuities cannot be diminished or affected by
" the subsequent provision of the two legacies to George
" and Thomas Patersons, by the sixth purpose of the
" said trust, or by the interests accruing on those pro-
" visions: Finds, secundo, that the annuitants were
" entitled to a full year's annuity at the second term
" after the testator's death, it being expressly provided
" that the annuities shall then be paid 'for the year
" 'preceding such term of payment:' Finds, tertio, that
" it has been sufficiently proved, and is now admitted,
" that Alexander Paterson, to whom a share of the
" residue of the estate was provided, survived the years
" of majority; and finds that Mary Paterson, another
" of the residuary legatees, was married to the claimant,
" James Archibald Casamaijor, many years ago; but
" finds it admitted that both these parties predeceased
" Mrs. Fothringham, the annuitant, who died on the
" 31st March 1834: Finds, quarto, that the shares of
" the residue of the estate, so far as the same consisted of
" capital sums set apart for answering the said annuities,
" provided to the said Mary and Alexander Patersons,
" by the fifth article of the purposes declared, whereby the
" said residue was appointed to be paid to the seven in-
" dividuals therein named, share and share alike, 'and
" 'the survivors or survivor of them,' under the con-
" ditions farther therein expressed, were not so vested
" in the said Mary and Alexander Patersons, as to
" enable them effectually to dispose thereof: Finds that
" the children of the said Mary Paterson, who were in

life at the death of Mrs. Fothringham, are entitled, as conditional institutes, to succeed to the share appointed in the first instance to be paid to her, according to the express provision to that effect; and finds, that in the event which has occurred, the share provided to Alexander Paterson must fall to 'the survivors' of the seven legatees named, who were in life at Mrs. Fothringham's death, together with the children of Mary Paterson, surviving, to the extent of one portion thereof, in the place of Mary Paterson herself, as conditional institutes: Therefore ranks and prefers the claimants, the trustees of Mrs. Fothringham, in terms of the first article of their claim, reserving all questions as to the amount of such arrears of annuities; but repels the second claim made for them: Ranks and prefers the claimant Mr. Casamaijor, as administrator-in-law for his children Jane, Mary, and Elizabeth, and their attorney and manlatories, in terms of the second alternative in the second article of his claim; but repels the claim made in his own right; and in respect that the claim made to a share of the legacy left to George Paterson was abandoned at the debate, as it had become known since the record was made up, that George Paterson had left a deed of settlement, repels the first article of Mr. Casamaijor's claim: Ranks and prefers the claimant Mrs. Rynd, according to the second article of her claim; but supersedes consideration of her first claim, with reference to the Lord Ordinary's interlocutor of the 24th March last: Ranks and prefers Mr. Alexander Pearson, as trustee under the marriage settlement of Mrs. Helen Paterson or Bligh, in terms of his claim: Ranks and prefers Mr. Pearson, in like

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" manner, as trustee in the marriage settlement of
" Mrs. Ann Paterson or Shepheard, in terms of h
" claim: Ranks and prefers the claimant Mrs. A
" Porterfield or Paterson, and her husband and m
" datories, in terms of her claim; reserving all questio
" as to the amount of such arrears of annuities; fin
" no expenses due to any party; and appoints the cau
" to be enrolled, in order that the points remaining fo
" consideration may be disposed of, and the multipl
" poinding finally extricated, on the principles of th
" interlocutor.[1] (Signed) JAMES W. MONCREIFF

" [1] *Note.*—This cause is certainly one of great difficulty, in two poi
" but especially in that which stands fourth in the findings of the s
" interlocutor. The first point presents a considerable perplexity, by
" apparent contradiction between the fourth and sixth heads of the t
" purposes. But after much consideration, the Lord Ordinary i
" opinion that the provision of the annuities must take effect accor
" to its terms, which are quite clear, unambiguous, and unqualified
" except by the clauses of that provision itself. The sixth provision of
" the conditional legacies to George and Thomas Patersons, however it
" may seem to interfere with the investment of the funds for securing the
" annuities, contains no declaration that the annuities shall be at all
" diminished on account of those legacies. Although, therefore, it may
" be difficult to explain under what views it was that the testator regu-
" lated those legacies by the amounts of residue stated, the Lord
" Ordinary is satisfied that there is no such distinct expression of will
" to alter or restrain the provision of the annuities, as can be held legally
" to produce that effect. The ultimate question here is not at all
" between the annuitants and the legatees, George and Thomas, but
" solely between the residuary legatees and the annuitants. There is no
" doubt that the special legacies must be paid, because the free residue
" did exceed 15,000*l.*, and they must, of course, bear interest from the
" term of payment. The real question is, whether the interest of those
" legacies is to be held as a burden diminishing the annuities, or as a
" burden diminishing the ultimate residue to remain for the residuary
" legatees. The Lord Ordinary is of opinion that neither by the terms
" of the deed, nor by any presumption as to the probable intention of the
" testator, can it be held that the burden was meant to affect the annuities
" which were made a primary purpose of the trust. It is entirely a ques-
" tion of intention. But the provision of the annuities being the first in
" order, and from its nature, presumed to be of first importance in the
" testator's mind, and the words being clear, the Lord Ordinary thinks

Against this interlocutor reclaiming notes were pre- ted to the Court by several parties. The appellants

nat nothing but the most express words in a later part of the deed ould be held to take away a right so explicitly given.

There seems to be no doubt on the point which stands second the interlocutor, that the annuitants were entitled to a full year's nnuity at the second term after the testator's death. It is much the ame as if he had ordered a half-year's annuity to be paid at the first rm after his death. The point seemed to be conceded.

The third finding merely comprehends certain points of fact, neces- ry for raising the fourth question. But it was certainly admitted the debate, that the fact of Alexander Paterson having survived ajority was sufficiently proved.

That fourth question is the great difficulty in the case. It is purely question of intention. Some aid may, indeed, be obtained from the cided cases. But when they have been all considered, it still comes necessary to return to the deed itself, and to weigh every ord of the remarkable clauses in this destination of the residue of the tate.

If there had been a surplus after securing the annuities, there is no oubt that it must have become payable to each of the nominatim gatees who survived the testator, if they also attained marriage or ajority. But though this circumstance creates a peculiarity in this rust, if the shares of the capital sums invested for the annuities must e dealt with in a different manner, it does not appear to the Lord Ordinary that it goes a great way to solve the question here in con- roversy. The case of a surplus is a very simple case; and it could arcely come to any other result, unless it were supposable that it ight be a question, whether even marriage or majority was necessary o vest the right? But while the terms of the deed would probably xclude this last construction, the question as to the capital sums which ere to be locked up evidently stands on a separate footing, in so far s a separate and independent quality or condition necessarily came to e added to the other suspensive declarations.

' The trustees are appointed to pay that part of the residue, ' as and when such capital sums become tangible by the deaths of the said annuitants respectively.' This means tangible to the trustees. When hat event happens, they are to pay to the individuals named, ' and the survivors or survivor of them '—Survivors of what? If the deed had one no farther, the words must either have meant survivors of the estator, or survivors of the event before mentioned. The subsequent lauses will not admit of the first construction; and it seems but rea- onable to suppose, that at least ' survivors' of the event was included n the expression. But the clause goes on to fix the terms of payment, hich are the first term after majority or marriage, ' or as soon after the first of the said events as the capital sums shall become tangible' y the deaths of the annuitants respectively. Here it is distinctly con-

ander Paterson, was not so vested in him previous to his death as to enable him effectually to dispose thereof;

" 'had they survived,' the share shall belong and be paid to such issue. " The party being married, and leaving issue in life, even that issue shall " not take, unless it be in life at the still postponed term at which the " parents, if surviving, would have been entitled to payment. Then, " who is to take if the issue survived the parent but was not in life when " the money was payable? Plainly, not the parent who had predeceased " the child, nor any one in that parent's right; and not the child's heir, ' seeing that it never was within the condition of the destination, not having been in life at the period fixed. In the case supposed, the share must evidently go to the 'survivors' of the other legatees.

" But take it in another way:—Mary Paterson dies, her children survive, and are in life when Mrs. Fothringham's annuity ceases. Are they not conditional institutes? The very case stated is, that they were in life at the time when Mary would have been entitled to receive payment if she had survived; in which it is implied, that as she did not survive, she never was entitled to receive payment, and that it is in their own right as conditional institutes, and not as substitutes through her, that the children are entitled to take the share, and exclude the other survivors. The Lord Ordinary must confess, that he sees no other way in which the clause can be reasonably construed. It distinctly explains the meaning of 'survivors' in the previous clause, and renders it impossible to suppose that the testator considered the share as already vested in the married legatee, so as to enable him or her to defeat the right of the children.

" But, if the share was not vested in Mary Paterson, so as to enable her to exclude her own children, neither could it be vested either in her or in Alexander Paterson, to the effect of excluding, by deed, the conditional institution of the other legatees surviving, in the more general case of the party dying before the capital sums were tangible, and leaving no issue. The clause seems to demonstrate, that in the ' estimation of the testator, the term of payment to which the survivance " peculiarly referred was the period when the capital sums might suc- " cessively be set free; and therefore the Lord Ordinary is on the " whole of opinion, that it is impossible to hold that there was any vested " right to render a conveyance effectual by a party who did not survive " that term.

" It must necessarily follow, from the view above taken of the clause " as to the case of a legatee dying, but leaving issue, that such issue must " be considered as in the same place in which the parent, if surviving, " would have been, and so entitled as one survivor to a share of the " legacy fallen by the death of Alexander Paterson.

" The Lord Ordinary will not enter minutely into the cases cited. " The late case of Marjoribanks against Aikman, 18th February 1836, " (14 D., B., & M., 521.) was much relied on. That was itself a very dif- " ficult case. The Lord Ordinary would have concurred in the judgment,

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and in so far as it sustained the claims of the other residuary legatees to the share of the residue left to the said

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" though he must also have agreed with the Court in not adopting the " test for such cases laid down in the note of the Lord Ordinary in that " case. But the present is a far more special case, in which, however " natural the leaning may be in favour of the vesting of such a legacy, he " finds himself constrained, by what he thinks the evident intention of the " testator, to hold that the right was not vested. The case of Smith " against Leitch (4 S. & D. 659., new edit. 665,) is a very important " case, though the report of it in the House of Lords (3 W. & S. 366.) " is not quite satisfactory. But the judgment in that case would have " been the other way if it had not been for the marked change in the " form of expression in the destination to Andrew Leitch, from that " which had been used in all the previous branches of the destination, and " the omission in his case of the material words which distinctly qualified " the right given in the others.

" The only other case to which the Lord Ordinary will refer (though " a great many were quoted to him) is that of Wallace against Wallace, " 28th January 1807, (Fac. Coll.) He certainly thinks that case of " 'great importance, and it seems to him, when carefully considered, to " afford a safe guide for the decision of this cause. There were two " points in it, and the parties who maintain the vested right naturally " refer to that which is reported second in order as the most important. " That related to a simple legacy to Alexander Wallace, the deed pro- " viding that on the death of the longest liver of the testator and his " wife, the trustees should pay that legacy to him. There was no " destination over or ulterior, and the simple question was, whether that " legacy had lapsed by Alexander Wallace predeceasing Mrs. Houston? " It cannot be doubted that the judgment was right, which found that it " had not lapsed. But it would have been a very different case even in " that branch of it if there had been a farther, and, as in this case, nomi- " natim institution or substitution of others, in case he did not survive the " longest liver.

" But the first part of that case appears to be the most instructive for " the present cause. That related to the residue of the estate, which was " to be divided among the children of Alexander Wallace ' that may be " ' in life at the death of the longest liver of me and my said spouse;' " these sums being made payable also at marriage and majority, ' which- " ' ever of these events shall first happen after the decease of the longest " ' liver of me and my said spouse.' Then there was a provision, that in " the event of the death of any of the said children before their share " became payable, it should accresce to the survivors equally. Nothing " can be more like to the present case, except that the deed there did not " contain the clause excepting from the right of the survivors the case of " a child dying before the shares were payable, but leaving issue. But " what was the question, and the ground of judgment? It was entirely " on the implied condition, ' si sine liberis decesserit,' as qualifying the

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Alexander Paterson, and found no expenses due. The respondents reclaimed against the interlocutor in so far as it was unfavourable to them. On advising these reclaiming notes, the Lords of the Second Division of the Court, of this date, pronounced the following interlocutor:—"16th December 1836. The Lords, having "heard counsel for the parties, and advised the cause, "adhere to the findings in the Lord Ordinary's inter- "locutor reclaimed against; recal the decernitures "therein contained, hoc statu, and remit to his Lord- "ship to apply these findings, and to proceed in the "cause as to his Lordship shall seem just."

Mrs. Fothringham's executors, Messrs. Pearson and Robertson, appealed against the above interlocutors in so far as the claim of the legatees to the share left to Alexander Paterson was sustained.

The Misses Casamaijor, Mrs. Rynd, and Mrs. Long Wellesley (legatees) entered a cross appeal against the

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"farther institution of the survivors. No one imagined or attempted to "argue, that, independent of that special case of a child left, which stands "on a peculiar presumption of equity, the share of the residue could have "been held to be vested in the child predeceasing Mrs. Houston, to the "effect of supporting a conveyance to a stranger. The whole pleadings "and opinions assumed the reverse. But wherein does this case differ? "Essentially in this only, that here the testator has so provided for that "case of a child dying before the fund was set free, but leaving issue, as "to shew that in actual intention he meant precisely what in Wallace's "case was presumed on a known rule of law, with the additional circum- "stance of a positive exclusion of the child if not in life when the con- "tingency emerged. No question, Mary Paterson's children must take, "and any child of Alexander would have taken also. But does it follow, "that either on general law, or on the provisions of this deed, there was "a vesting in them to transmit the right, independent of the conditio "si sine, &c. or the special provision of the testator? The Lord Ordinary "thinks not.

"The case of Mirrlees, 17th May 1826, (Mirrlees v. Mathie, 17th May "1826, 4 S. & D. 591, (new ed. 599.) was not fairly tried on the "material question, and at any rate was different in essential points, "though bearing a resemblance to this case in some particulars.

"J. W. M."

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first finding in the interlocutor of the Lord Ordinary adhered to by the Court.

18th July 1839.

Appellants Argument.

Appellants.—It is clear, from the structure and terms of the trust deed, that the intention of the testator was that Alexander Paterson, one of the nominatim residuary legatees, having survived the testator, and having also survived his own majority, there became vested in him a right to one-fifth part of the whole residue, including those portions of the residue which had been set apart to answer the annuities.

In the law of Scotland a fundamental distinction, in reference to the question of vesting, is to be found between legacies left to individuals called nominatim,—known to the testator as existing persons,—about whose identity there can be no doubt or uncertainty; and legacies left to persons called by mere description, as members of a class, nati or nascituri, whose very existence, number, and identity are contingent and uncertain, not only at the date of the testament, but also at the death of the testator. The certainty and complete ascertainment of the legatees which obtains in the former class, as opposed to the contingency and uncertainty as to the persons and number of the legatees which may exist in the latter, has given rise to very different, and indeed to contrary, rules of construction in regard to the vesting of the legacy, as applicable to these two classes of legacies.

The rules as to the vesting of legacies in nominatim legatees adopted by the law of Scotland from that of Rome are:—

1. A legacy, even when left to a nominatim legatee, does not vest until the death of the testator; and there-

s, unless the legatee survive the testator, the legacy s not vest in him.

. Where a legacy is made payable to a nominatim ıtee at a certain fixed period, however remote, or at me that must arrive, although it is uncertain when,— legacy is held to vest at the death of the testator s legati cedit), although the period of payment is tponed (sed not venit).

. When a legacy is made payable to an individual he occurrence of an event which is in its own nature ertain, or on the arrival of a period which may never ıe at all,—the legacy does not vest, unless and until condition is purified by the occurrence of the event, he arrival of the period. (Dies incertus pro con- ɔne habetur). But as soon as the condition is ified, the right vests, although the legatee may die ɔre it be possible to obtain payment.[1]

Where legatees are not mentioned nominatim, but called as a class of persons who may or may not t, or who may be more or fewer in number, the as to the vesting of the bequest in any of the con- ent legatees is different from that which applies to ıinatim legatees. The most ordinary instance of kind of legacies is where they are left to the chil- ı of an existing individual, or to the issue of a sub- ng marriage. Where the children of an individual called, there must exist an uncertainty as to the

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Digest, lib. 36. tit. 2. l. 31.; Codex, lib. 6. tit. 53. l. 3.; Wallace v. ace, 28th Jan. 1807 (Mor. Dict., App. 6. voce Clause); Sess. rs, Adv. Lib. 1806–7, II. 267; Semples, 15th Nov. 1792, Mor. 8108; e v. Hume, 28th Jan. 1807, not reported, but see Hume's MS. Notes; h's Trustees v. Leitch and others, 2d June 1826, F. C. and 3 W. & S. 379; Mirrlees v. Mathie, 17th May 1826, F. C.; Smith v. M'Beth, May 1834, F. C.; Aikman v. Marchbanks and Brockie, 18th Feb. , F.C. and 14 D., B., & M., 521.

Argument.

right should vest at all during the subsiste uncertainty. It very often happens that whil or a residue is given to children, a liferent i the parent, by which the term of payment is until the parent's death; and in this way the payment comes to coincide with the vesting o by the termination of the uncertainty as to th But this is merely an accidental coincidence. incidence does not take place where the issue riage are called as legatees, and where a coi rent is given to the spouses. In such a case vests on the death of either parent, although of payment does not arrive until the death of

The cases now cited afford instances of a made under a trust deed to the children of a person, in which case the uncertainty as to t and number of the beneficiaries, continues d life of that parent. But cases sometimes oc the beneficiaries are described as the childr issue of a particular marriage. In such cases, lution of the marriage, by the death of eitl parents, is the event which puts an end to t tainty. This, to be sure, may not be the ter ment, where a conjunct liferent is provided

parents. But still, by the death of either parent, the children of the marriage are finally ascertained; there no longer remains any uncertainty as to the number or persons of the beneficiaries, nor any objection in principle to the vesting of the fee, under the burden of the surviving parent's liferent.[1]

Certain terms of payment are specified, viz. the marriage or majority of the legatees; but the period at which the legacy is to vest is nowhere expressly stated. The mere circumstance that the whole or a portion of the estate bequeathed is subject to the interest of an annuitant or liferenter in no respect affects its vesting according to law, although it may afford a very good reason why the testator should provide that the legacy should not be paid, even at the specified term of payment, if the fund from which it is to be paid is not at the term of payment released from the operation of the liferent. The testator has created a liferent over certain funds, the fee of which he has also disposed of; and as he has specified no period at which the fee is to vest in the party to whom it has been so disposed of, it is clear that it must legally vest in that party upon the death of the testator. The payment was necessarily postponed, not with reference to the circumstances of the legatee, but to the state of the property.[2] The class of legatees must answer the description at the time the gift was to take effect.

Where several legatees are called together, there is frequently a substitution of the survivor or the survivors. The effect of such a provision may be, either that the

[1] Sivright v. Dallas, 27th Jan. 1824, Fac. Coll., and 2 S. & D. 643. (new ed. 543.)

[2] Atkins v. Hiccocks, 1 Atky. 500.

the vesting of the legatees right. The meaning of the term survivors or survivor is plainly the survivors or survivor of the testator. The surplus of the estate, after a sum is set apart for answering the annuities, clearly became vested in the legatees at the death of the testator, though the enjoyment thereof, except in so far as necessary for the maintenance of the legatees, might be postponed till their majority or marriage; and the same words cannot be read differently as to portions of the same fund. In Cripps v. Woolcott[1], by Sir John Leach, words of survivorship were referred to the period of division and enjoyment, but there the meaning put on survivor is inconsistent with that in Doe v. Prigg, 8 Barn. & Cress. 231. (See judgment as delivered by Bayley, J.[2]), where it was held that the term "sur-"viving" referred to the testator's death; the question being now sub judice in a case before the Lord Chancellor[3]; and see also Hill v. Chapman (1 Ves. jun. 405).

In the Cross Appeal.—The trustees of Mrs. Fothringham, who there appeared as respondents, maintained, that it was clear from the terms of the sixth purpose of the trust, that the legacies to George and Thomas Paterson ought not to be deducted from the capital invested for answering the annuities. The whole residue of the estate, after payment of debts and other onerous obligations, "whatever it might be," was directed to be invested in payment of the annuitants, if there were not otherwise funds for the purpose; in short, with the exceptions above referred to, and the payment of the legacy to Mrs. Alexander, these annuities were to be at all events secured to the full extent of funds left by the

[1] 4 Mad. 11. [2] 8 B. & C. 235.

[3] Wordsworth v. Wood, (since decided,) 4th Dec. 1839.

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Respondents Argument.

testator. These were clearly the primary objects and purposes of the trust; every subsequent bequest was plainly subsidiary thereto.

Respondents.—It being admitted that the will is to be construed according to the enixa voluntas of the testator, the clear inference is that Alexander Paterson's share did not vest, in respect he did not survive Mrs. Fothringham. Till the death of the annuitants there was no vesting of the legacies, which therefore depended on contingencies; Alexander Paterson's share did not vest because the event of the fund being tangible had not arrived. When a trust is granted for the protection of the interest of various substitutes the deed subsists, and enures to the protection of all parties interested. The view of the appellants is sufficiently met by the authorities. The case of Wallace[1] illustrates the effect of a destination of a residuary trust fund, after the death of a liferentrix, to a class of persons and the survivors of them, and shews that the survivance of such term of division and payment was a condition precedent of such right, even although it had been also qualified with an express declaration that the shares were to be payable to such persons on their respectively attaining majority or being married. See also Lawsons v. Stewart[2]; Davidson v. Miln, 13th Feb. 1828[3]; Buchanan, 12th Feb. 1830[4]; Mowbray v. Scougall, 9th July 1834[5]; and in the House of Lords, 31st August 1835.[6]

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[1] Mor. App. voce Clause, No. 6.
[2] 2 W. & S. 625.
[3] 6 S. & D. 536.
[4] 8 S., D., & B., 516.
[5] 12 D., B., & M., 910
[6] S. C. 2 S. & M'L. 905.

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But even although the right to a share of the fee or capital should be held to have vested in Alexander Paterson in his lifetime, yet that right could not be defeated by the gratuitous settlement on which the appellants founded. A right to two or more parties jointly, subject to a condition of accretion in favour of the survivor of them, communicates to each of the joint owners not only a qualified right to his or her own share, but a conditional right to the other shares,—not to be defeated gratuitously, while it remains in the possession of a trustee subject to its ultimate destination. Bissett, 26th Nov. 1799 [1]; Seton, 6th March 1793 [2]; Ersk. b. 3. tit. 8. s. 44. and the case there cited.

In the Cross Appeal.—According to the sixth purpose of the trust, the funds (the interest of which was to be paid to the annuitants) were to consist of the residue of the trust estate, after deducting the provisions to George and Thomas Paterson; the yearly sums which were divisible between the annuitants could not exceed the interest or dividends arising from such residue. The provisions to George and Thomas Paterson were expressly directed to be paid to them at the first term of Whitsunday or Martinmas after the testator's death, and to bear interest from the said term of payment till paid, and that not subject to any qualification whatever in favour of the annuitants.

Ld. Chancellor's Speech, 16th July 1839.

LORD CHANCELLOR.—My Lords, on one part of this case I confess I am surprised that such a decision should have been made; more especially when I find it must have been twice argued, first before the Lord Ordinary,

[1] Mor. App. 1. voce Deathbed, No. 2. [2] Mor. 4219.

Ld. Chancellor's Speech.

s has fixed the precise period at which they are to be aid. The question being whether those sums are to s paid to the prejudice of the annuitants, the Court ve held that the annuitants are to be paid in full, twithstanding the express direction in the deed that ese legacies are to be paid within a certain time after s death. It appears to me there is no room for spute as to the necessity of giving effect to that direcn ; that exhausts one of the appeals. The judgment this House must interpose to set that right. With gard to the other clauses, they are not consistent with ch other; and I would, therefore, propose to your rdships to reserve the consideration of the questions sing out of these till Thursday next, when your rdships will have had an opportunity of looking more rticularly into them.

Further consideration adjourned.

Ld. Chancellor's Speech, 18th July 1839.

LORD CHANCELLOR.—My Lords, this case was adurned for the purpose of giving your Lordships an portunity of looking over the deed on which the estion arises. There were two appeals: one as to the ayment of two sums of 1,000*l.* each, which by the dgment of the Court of Session it had been found were ot payable, except subject to annuities. The note of the Lord Ordinary sets out the grounds on which he had come to that conclusion, stating that "The sixth provi-
"sion of the conditional legacies to George and Thomas
"Paterson, however it may seem to interfere with the
"investment of the funds for securing the annuities,
"contains no declaration that the annuities shall be at
"all diminished on account of those legacies. It is
"entirely a question of intention; but the provision of

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"the annuities being the first in order, and from its [illegible] it
"nature presumed to be of first importance in the te[illegible]
"tator's mind, and the words being clear, the Lor[illegible]
"Ordinary thinks that nothing but the most expres[illegible]
"words in a later part of the deed could be held to[illegible]
"take away a right so explicitly given."

The decision of the Lord Ordinary, therefore, agree[illegible] ably with that of the Inner House, proceeds upon thi[illegible] that there is nothing to shew that the annuities were t[illegible] to be diminished on account of the legacies, and that unle[illegible] there are express words in the latter part of the dee[illegible]d, they will not have the effect of taking away the rig[illegible]ht that is expressly given in the early part of the dee[illegible]d. There are certain words contained in this deed whi[illegible]ch must by some accident have been overlooked. In t[illegible]he earlier part of the deed, after directing payment of [illegible]his debts, and fulfilment of the obligations existing at [illegible]he time of his death, payment of the expenses attendant [illegible]on the execution of the trust and of 500*l.* to his sis[illegible]ter Mrs. Alexander, he directs that, in the event of [illegible]he residue of the proceeds of his funds not being sufficie[illegible]nt, the whole shall be invested in the annuities. There is, in that enumeration, no doubt, no mention of those legacies to George and Thomas Paterson; but he provides in what events the property he might leave to his legatees shall be payable. In the event of the residue being 15,000*l.* or upwards, then he directs 1,000*l.* to be paid to each of George and Thomas Paterson. If it shall be under 15,000*l.* and not less than 8,000*l.*, then that George and Thomas Paterson shall only have 500*l.* sterling each. The remainder of the said estate was to be vest[illegible] and laid out for yielding the annuities as aforesaid. I[illegible] if such residue shall not amount to 8,000*l.*, then he s[illegible]

he has fixed the precise period at which they are to be paid. The question being whether those sums are to e paid to the prejudice of the annuitants, the Court ave held that the annuitants are to be paid in full, ithstanding the express direction in the deed that e legacies are to be paid within a certain time after death. It appears to me there is no room for ute as to the necessity of giving effect to that direc- ; that exhausts one of the appeals. The judgment his House must interpose to set that right. With rd to the other clauses, they are not consistent with h other; and I would, therefore, propose to your dships to reserve the consideration of the questions ing out of these till Thursday next, when your dships will have had an opportunity of looking more icularly into them.

Further consideration adjourned.

LORD CHANCELLOR.—My Lords, this case was ad- ned for the purpose of giving your Lordships an ortunity of looking over the deed on which the stion arises. There were two appeals: one as to the ment of two sums of 1,000*l.* each, which by the gment of the Court of Session it had been found were payable, except subject to annuities. The note of Lord Ordinary sets out the grounds on which he had e to that conclusion, stating that "The sixth provi- ion of the conditional legacies to George and Thomas aterson, however it may seem to interfere with the nvestment of the funds for securing the annuities, ontains no declaration that the annuities shall be at all diminished on account of those legacies. It is entirely a question of intention; but the provision of

"It is my intention that the said George and Thomas "Paterson shall not be entitled to receive any thing "whatever under this deed; and I direct my said "trustees and trustee to regulate themselves accord- "ingly; the above-mentioned eventual legacies being "to be payable to the said George and Thomas "Paterson at the first term of Whitsunday or Martin- "mas after my death, with interest from said term of "payment till paid." There is a distinct period fixed at which those legacies shall be paid; and it is obvious that those legacies are to be paid even in the event of there not being sufficient to provide for the payment of those annuities and those sums without a diminution of the amount of the annuities. I apprehend, therefore, it is quite clear there is that which the Lord Ordinary says would be sufficient. There is evidently a statement in the latter part of the deed giving a construction which would be undoubtedly the proper construction if there had been such a provision in the other part of the deed; taking then the whole together, I apprehend there is no doubt that the decision of the court below is incorrect, and that these legacies of 1,000*l.* each are payable at the time therein directed, though that may interfere with the payment of the annuities.

The other question which arises is undoubtedly a question of much greater difficulty, turning entirely upon the construction of this instrument, and how the words "survivors or survivor" are to be understood to apply,—whether at the period of the testator's death, or at the several periods at which the several sums he has given by this instrument are to be payable, i. e. referring the payment of any surplus from the sums set apart to

as provided for another event, that of his estate
g adequate to provide for the payment of all
nuities. He directs that if the estate is not
for the payment of all those annuities, then the
shall abate; but if there be more than sufficient,
e a surplus, he directs that the surplus, together
invested sums when tangible by the deaths of
annuitants respectively, shall be paid by the
thus, "or in the event of there being no surplus,
he said invested sums, when tangible as afore-
shall be paid to 'seven persons,' share and
alike, and the survivors or survivor of them,
hat at the first term of Whitsunday or Martin-
ıfter their respectively attaining twenty-one or
married."

in speaking of the death of the annuitants, and
od therefore at which these various sums would
what he calls tangible, he refers to those periods
eriods at which the sums would be to be paid;
refers to two other periods, at which he says
ll be paid, namely, when the legatees attained
ne or were married. It is obvious one of the
referred to is when such invested sums should
tangible by the death of the annuitants, the
fers to the period at which the annuitants should
vely marry or attain twenty-one; and looking
e at the subsequent clauses, the author of this
ent has given us this clue to his meaning, that
king of the periods of payment he speaks of
ods at which the property would become tangible,
the periods at which the parties should die or
wenty-one.

there are four provisions with reference to the

e prospectively, in order to secure the share which ıt eventually become theirs. The great probability ıat if the question had arisen upon these provisions, ould have been considered that those were shares of t they were entitled to in possession, but with a er given to the trustees to intercept the actual enjoy- ıt for the purpose of settling upon them for life, with ainder to those that might come after them.

ut then, my Lords, comes the provision upon which great question arises. It is provided, that if any of legatees die before the term of payment (one or e, as the case may be) of these shares, leaving issue ch shall be in life at the time the parent would have n entitled to have received payment of their shares they survived, such issue shall take the parent's re at the time at which such deceasing parents would e been entitled to receive the same if they had been ife.

Now the way of trying the question upon this pro- on appears to me to be this: — suppose the shares e all vested at the time contended for by the appel- s, namely, at the moment of the testator's death, not, as contended for on the other hand, that the ing was postponed during the continuance of the icular interests of the annuitants:—if the legacies ed, and the term of payment only was postponed, it ngular that a provision should be made for the chil- ı of those particular parties who would be provided without it, because it would become the property of parent, and the parent would of course have do- ion over it, for the purpose of providing for his ldren.

But it is hardly necessary to reason upon the impro-

the provision is natural and consistent, as it only secures to the family of each legatee dying before the time of payment, leaving issue, the benefit of the legacy against the other surviving legatees.

It is from this clause, and this clause only, it appears to me that the testator's intention may fairly be inferred; and it does appear to me that the provision in that clause in favour of children is not consistent with the vesting of the capital at the time of the testator's death; that the provisions are not consistent with what must have been his obvious wish if he had looked to the vesting of the capital either at that period or at the time when a legatee became of age or was married; that it can be reconciled only with his applying it to the survivorship, at the periods at which the funds constituting the capital might be relieved from the payment of the annuities. I think that your Lordships will come to the conclusion that there is sufficient upon the face of this instrument to shew that the term "survivor" does not refer to the period of his own death, but that it refers to the period at which those sums would become tangible: that would therefore lead to an affirmance of the interlocutor appealed against. With regard to the other question, the interlocutor brought before your Lordships by the cross appeal must be reversed. Your Lordships have not before you the means by which this can be set right here. I apprehend that the form of the order will be to affirm the interlocutors in the original appeal, and to vary them so far as relates to the legacies, declaring that those legacies were payable to George and Thomas Paterson, at the first term of Whitsunday or Martinmas after the testator's death, and then to remit it to the Court below, to

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carry into effect that order, because your Lordships have not the proceedings in that state before you which will enable you to settle the question finally. I understand that the cause is in that state which will enable the Court below to proceed upon that declaration.

Lord Advocate.—Certainly, my Lords.

The House of Lords ordered and adjudged, That the said original petition and appeal be and the same is hereby dismissed this House; and that the said interlocutors, so far as complained of in the said original appeal, be and the same are hereby affirmed: And it is further ordered and adjudged, That the part of the said interlocutors which is complained of in the said cross appeal be varied, by omitting so much thereof as finds that the claim to such annuities cannot be diminished or affected by the subsequent provision of the two legacies to George and Thomas Patersons by the sixth purpose of the said trust, or by the interests accruing on those provisions: And it is declared, That the legacies of one thousand pounds sterling to each of the said George and Thomas Patersons (under the trust disposition and settlement of Alexander Porterfield esquire) were payable to the said George and Thomas Patersons at the first term of Whitsunday or Martinmas after the death of the said testator: and that the sum applicable to the payment of the annuities payable under the said trust disposition and settlement was the residue of the said trust fund, after deducting as well the testator's debts and obligations, the expenses of the trust, and the legacy of five hundred pounds to Mrs. Alexander, as the said two legacies payable to the said George and Thomas Patersons: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this declaration and judgment.

RICHARDSON and CONNELL,—SIMPSON and COBB, Solicitors.

[*25th July* 1839.]

(Appeal from the Court of Session, Scotland.)

MALCOLM STEWART, Esq., of Atholl Bank, Appellant.[1] (No. 24.)

[*Lord Advocate (Rutherfurd)—James Anderson.*]

WILLIAM GLOAG, Esq., residing in Perth, Manager, and others, the Ordinary Directors, of the County and City of Perth Fire Insurance Company of Scotland, for themselves, and for behoof the said Company and whole individual Members thereof, Respondents.

[*Pemberton—A. M'Neill.*]

Advocation — Amendment of the Libel — Practice. — An insurance company raised an action against one of their former partners and directors to have him ordained to concur in signing a discharge of an heritable debt which stood in his name; an extended deed of discharge was produced along with the summons, and the conclusion of the libel was to ordain the defender "to grant, execute, "and deliver to the pursuers the foresaid discharge and "renunciation, to be produced at calling hereof;" the defender stated objections to signing the deed in the shape it then stood; the pursuers craved leave to amend the summons by inserting the words "or such valid and suffi- "cient discharge and renunciation of the said debt as the "debtor therein is bound to receive;" the defender opposed the amendment, and the sheriff found the proposal incompetent, "because changing and extending the nature

[1] Rep. 16 D., B., & M., 86.

" and conclusions of the libel." The record was closed, and the sheriff found that the defender was not bound to execute the deed libelled on and produced, but suggested alterations which he, the sheriff, thought necessary; and a new deed, accordingly altered, having been lodged in process, the sheriff " decerned the defender to subscribe the " amended deed of discharge," which the defender refused to do, and advocated; the pursuers did not advocate on the ground of refusal to allow the amendment, neither did they propose to open up the record, and state an additional plea in law on that point: Held (reversing the judgment of the court, but affirming the interlocutor of the Lord Ordinary) that the defender was not bound to sign the only deed which he was called upon by the summons to subscribe.

Observed, per L. C.—(1.) In courts of equity, under prayer for general relief, the court is at liberty to give relief consistently with the case stated, but there the court never give relief inconsistent with the case stated; and if the case stated had been that of the delivery of a particular instrument, and the demand of the execution of that particular instrument, and it turned out that the defender was not bound to execute that instrument, no court would think of directing the execution, not of the deed itself but of some other deed which the court should take upon itself to frame and tender to the party. (2.) It is well understood now, and settled to be the practice in England, that when a judgment has been pronounced, and one party complains and brings the judgment under review by a regular course of appeal to a superior court, the other party, if he has any thing to allege against the judgment, is at liberty to state his objections to the judgment in the same proceeding. It is a constant rule in chancery, that if a party appeals against part of an order, the appeal is open as to the rest; and that is the whole effect of the Scotch case of Cuningham v. Duncan, 17th July 1827,[1] and the judgment in that case did not go the length of letting in the parties to amend in the superior court.

[1] 2 Sh. & M'Lean, 984.

1st Division.

Lord Ordinary Cockburn.

THE action commenced by an ordinary summons before the sheriff of Perth, at the instance of Mr. Gloag and other directors of the Perth Fire Insurance Company, against the defender Mr. Stewart, dated the 26th of May 1835, and which set forth, that by the thirty-fifth article of the copartnery of the said County and City of Perth Fire Insurance Company, it is stipulated, "That all dispositions, assignations, securities, and other "writings whatsoever to be executed in favour of the "company shall be taken to and in name of the "manager and the three junior ordinary directors, or "those standing at the bottom of the list of such "directors for the time, or such other three of the "ordinary directors as the directors or major number "of them may appoint, and to the survivors or survivor "of them, and their or his assignees; but in trust "always for themselves and the whole other partners of "the company, future as well as present; and which "trustees and their foresaids, in whose favour such "securities and writings shall be taken and conceived, "shall be bound at any time when required to denude "themselves by habile conveyances of the said trust "property, but that always at the expense of the "company, and to convey the same to such person or "persons, and upon such terms, and under such "conditions and declarations, as shall be appointed by "the directors, with warrandice from their own facts "and deeds; and all dispositions, assignations, renun-"ciations, bonds, contracts, submissions, and other "deeds whatsoever to be executed by the company "shall in like manner be signed and executed by the "manager and the said three ordinary directors at the "bottom of the list for the time being as aforesaid, or

that Mr. Campbell's agent was ready to pay the amount of the said heritable debt, and interest due thereon, on receiving the discharge and renunciation; "but in consequence of the said defender refusing to execute the said discharge and renunciation unless certain clauses were inserted therein, to which the agent for Mr. Campbell would not agree, the pursuers have been unable to obtain a settlement of the said debt and interest; therefore the said defender ought and should be decerned and ordained to grant, execute, and deliver to the pursuers the foresaid discharge and renunciation, to be produced at calling hereof."

In defence it was admitted that the defender was at one time a shareholder and a director of the company, but that he had ceased to hold shares therein. His objections to sign the deed were thus stated:—

"Subsequent to the period when the defender's connexion with the company so terminated, and, as he thinks, about the time mentioned in the summons, the agent of the pursuers presented to him the discharge and renunciation libelled, requiring him to subscribe the same as a director of said company. This deed proceeds in name of Mr. Gloag, the present pursuer, as manager of the company, and Mr. Robert Bisset, writer in Perth, Malcolm Stewart esquire, of Atholl Bank, and George Lawson Cornfute, manufacturer in Perth, three of the ordinary directors of the said company, for themselves and the whole other partners of the said company, future as well as present; and the defender, in an after part of the deed, as trustee or director and for

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Statement.

" behoof of said company, is made to exoner and
" discharge the debtor in the bond, and to bind himself,
" and the whole partners of the company, in absolute
" warrandice of the discharge; the defender refused
" and still refuses to subscribe this deed, because it sets
" forth, on the face of it, a positive falsehood. It
" proposes to make the defender a party to it in a false
" and fraudulent character, namely, as a director of the
" company, while in point of fact, he is no director
" having long ago ceased to be so, and notified this
" the public through the medium of the local new
" papers;" and it was pleaded that the conclusion
the action being, that the defender should be ordain
to execute a particular deed in the character of
director of the Perth Fire Insurance Company, but
defender not being, in point of fact, either a direct
shareholder, or in any way connected with the compa
such conclusion is incompetent, because the defen
cannot be compelled to assume and act in a false and
fictitious character, or to execute any deed at variance
with the fact, or write himself down a director, while he
is neither a director nor a shareholder of the said
company; and that the defender is entitled to absolvitor,
with expenses.

Upon advising the case afterwards, with replies fo
the pursuers and duplies for the defender, the sheriff
on 25th September 1835, ordered the parties to state
within a certain period, whether they were willing
hold their pleadings as containing their full and fi
statement of facts. Against this interlocutor the
suers reclaimed, craving, before closing the re
allowed to amend their libel in certain

the sheriff substitute, by interlocutor of 18th November 1835, found, "that the same is incompetent, because "changing and extending the nature and conclusions of "the libel, and refuses the motion to amend." [1]

Thereafter the record was closed, and the following interlocutor pronounced: "Perth, 16th December 1835. "Having advised the closed record, before answer, "appoints the pursuers, between and the 23d cur- "rent, to produce the original assignation of date "15th May 1832, or certified copy thereof." And the assignation ordered by the last-quoted interlocutor having been produced, the sheriff substitute (23d December 1835) found, "that the defender, having "admittedly accepted the office of one of the directors "of the pursuers company, is bound at common law, "and under the rules of the company, to execute all "writings necessary for the ordinary management of "the business of the company, and specially for the

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[1] "*Note.*—The conclusions of a summons may be restricted by a minute, "without any amendment, because that the greater comprehends the less, "But it is incompetent to change the nature of the action, or to extend "its conclusions. In this case the conclusions are specific to compel the "defender to execute a certain deed, and the amendment craved is to "generalize the conclusions, so as to embrace any deed necessary for the "end sought. Although such amendment cannot, on correct principles, "be permitted, perhaps it is unnecessary, because when the deed libelled "is objected to by the defender, on certain technical grounds, there "appears no incompetency in the court making such alterations on the "deed as may obviate these objections, and decerning for execution of the "deed so amended. No change would be made on the action, but this "result would arise from the defence, and the court would decern in "terms of the libel as modified by the defence. Is it not the recognized "rule of law that where the nomination does not specially stipulate to "the contrary a majority of the trustees possess the whole powers of the "trust? Stair, b. i. tit. 12. sect. 13.; 12th June 1824, Campbell v. "M'Intyre. In the case, 15th February 1827, Lord Lynedoch, "(affirmed) the deed declared three to be a quorum, to which number "the trustees were reduced."

hird line from the foot of the sixth page of the said lischarge, these words being all unnecessary, and of loubtful consistency with the fact that the said lefender is not now a partner of the said company: ppoints the said deed, as so amended, to be of new ngrossed and produced in process, and thereupon lecerns the defender to subscribe the same, reserving onsideration of the farther conclusions of the summons, and decerns." To which interlocutor the sheriff stitute (10th February 1836) adhered.[1]

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[1] *Note.*—The defender's case has been pled with remarkable ability in e reclaiming petition, remarkable the more that a very trifling question s been raised into one of importance. It is permitted to explain the nclusions of a summons by the narrative. The narrative of the mmons in this action clearly shows that all that was sought at the nds of this defender was a valid discharge of a certain heritable curity, in the constitution of which the defender's name was assumed one of the trustees for the creditors in the debt. The conclusion, doubt, bears reference to a certain writing produced as the discharge ght at the defender's hands, and there is no question but that the nclusion might have been framed in more general terms. The fence was that the defender was not bound to subscribe the discharge the precise words used in the writing put in. But if the objectione words were removed there existed no other legal defence against oming a party to the deed. The court has adopted the defence, l ordered the objectionable words to be expunged, and the deed, as expunged, to be subscribed. The defender now pleads that the ion must fall, because the deed which he is decerned to execute is longer the deed embraced by the conclusions of the summons. ith the most scrupulous observance of form, there exists a clear and rious distinction between the substance of a deed and its mere materls. The deed wanted, and concluded for, is substantially the charge of a certain bond, and nothing but that discharge has been erned for, although it may be that the discharge may not be on cisely the same paper,—but even this may be effected,—and although few words are expunged. Suppose a summons brought to compel execution of a certain conveyance, and that there, as here, the posed disposition is concluded for specially conform to the same oduced. Suppose farther, that the defender objects that the deed so oduced binds him in absolute warrandice, and that he is liable only the restricted warrandice from fact and deed. Suppose the court stains the defence, and ordains the deed to be corrected, so as to

To which interlocutor the sheriff substitute (13th July 6) adhered [1], and the sheriff, on appeal, adhered.

Stewart advocated to the Court of Session, and gave note of additional pleas in law, in these terms:— The advocator, having ceased to be a director or a ner of the County and City of Perth Fire Insurance pany, was not bound to execute the deed libelled

2. The record having been closed on a summons h concluded specifically to have the advocator ined to execute the discharge libelled and produced it, and the sheriff having found that the advocator not bound to execute that deed, the advocator ought ave been assoilzied or the action dismissed. 3. It incompetent for the sheriff to order a new deed to prepared, or the old one remodelled, under the clusions of the respondents summons, and the narra- on which they proceeded, more especially as the ntee of the deed by whom it was prepared was no ty to the action. 4. Although the advocator might bliged to concur, along with the existing directors, xecuting a discharge and renunciation, setting forth res veræ gestæ, he was not bound to appear actively, undertake obligations on himself individually or the pany collectively; and he was entitled, before being gged into court or called upon to subscribe the deed. revise it for his own safety and interest; and the

[1] *Note.*—The question urged in the first branch of the petition has been long since determined by final judgments. The defender is not entitled to his expenses, seeing that he has been unsuccessful in his defence that no alteration could be permitted on the deeds of discharge as originally produced. Expenses have not been given against him, because that he has been assoilzied from the claim of interest up to the date when the deed has been finally approved."

there truly exists no disputable matter for a decision of the court between the parties.

The parties having respectively lodged their notes of additional pleas, and being satisfied with the record as made up in the inferior court, the Lord Ordinary, Corehouse, before whom the cause originally came, pronounced the following interlocutor:—"23d December "1836. The Lord Ordinary, in respect the record "as closed in the inferior Court is not objected to, and "the parties having each given in additional pleas in "law, holds the record as closed in this court, and "appoints parties to debate."

No renewal of the proposal to amend their summons was made by the (respondents) pursuers.

Lord Corehouse having been moved to the Inner House the cause came to depend before Lord Cockburn, as Ordinary, and his Lordship, on hearing parties, pronounced the following interlocutor:—"8th June 1837. "The Lord Ordinary having heard parties, and con-"sidered the process, sustains the reasons of advocation, "advocates the cause, recalls the interlocutors of the "sheriff; finds that the advocator was not bound to "sign the only deed which he was called upon by the "summons to subscribe; sustains this defence, assoil-"zies the defender, and decerns; finds him entitled "to expenses incurred by him in this and in the inferior "court, and remits to the auditor to tax the account "thereof, and to report." And added this note:— "The original pursuers should, in prudence, have "concluded generally against the defender for the "execution of any proper discharge. But, instead of "this, they exhibit a specific deed, already extended, "and subscribed by other parties, and conclude solely

, that they proposed to extend the grounds of their
on by amending the libel. Yet the sheriff and
rt erroneously, under an action which did not con-
le for that, ordained the appellant to subscribe the
l. The Lord Ordinary's view of the matter is the
ect one. There are objections to the deed pro-
d to be signed, particularly in the clause of war-
lice; but the question is, whether under this un-
nded action the appellant can be required to sign
After closing the record in the Court of Session it
no longer competent to ask to amend the libel; the
ty must, under 6 Geo. 4. c. 120., abandon his action
nsufficient. A deed newly engrossed, and to be
cuted of new, was produced, under the judgment of
sheriff; therefore it was not a deed that under this
mons the appellant could be required to execute.
e appellant was not bound to state any other objec-
s to the action.

There were no other parties than the appellant and
ondents to this action; the grantee, Mr. Campbell,
not made a party to it. The only issue raised by
summons was whether the deed, as proposed and
ared by the grantee's agent, should be forced upon
appellant for signature. That was given up; but
out any alteration on the action, the appellant was
d to sign another deed, involving him in obligations
h he did not choose to undertake. Although the
l is not set forth in terms in the summons, it has
n held in the Court of Session that by simply re-
ing in the summons to a deed to be produced it is
ficient. [*Lord Chancellor.*—This is important, be-
se if the deed were set forth in the summons the

basis of the action. Vide also Peacock, 26th November 1821; Jackson, 9th December 1825; Still's Trustees, 12th November 1829; Stirling, 4th March 1830; and Waldie, 2d December 1830. In all these cases the court applied the rule that a pursuer could not found on grounds of action not contained in the summons.

Now, to oblige the appellant to sign the newly engrossed deed would be to make him do what is quite out of the conclusion of the summons, and involving obligations which, at the proper stage, he will show he is not now, independently of this matter of form, bound to undertake.

The argument of the respondents upon the point of allowing the amendment leads to important consequences, because if they did not ask the Court of Session to allow amendments, how can they ask this House to do so? [*Lord Chancellor.*—In such a state of matters this House is accustomed to reverse the interlocutor, and remit to the court, when the parties may amend and the court do what is thought necessary]. The application touched only the merits, not the interlocutor refusing the amendment; then there is a new closing of record in the Court of Session, which clearly shut out the amendment, no such amendment having been proposed.

Besides, there can be no amendment of the libel after the record is closed; see 6 Geo. 4. c. 120. (Judicature Act,) confirmed by the case of Wilson, 11th July 1826.[a]

[a] Shaw's Digest, voce 'Process,' p. 371, sec. 5, and references.

to sign a discharge, but objected only to particular parts of the deed as framed, because he says, "it sets "forth a falsehood," he not being a director, as set forth on the deed. Liberty was refused to amend, because the sheriff thought it unnecessary; so it was not to be expected that the interlocutor so refusing would be carried to review by the respondents. [*Lord Chancellor.*—They do not seem to have the prayer for general relief in Scotland.] The words "to add and "eik" were used in defences; and to "do otherwise as "to your Lordships shall think proper," in petitions, confine the parties within the conclusions or substantial prayer of the application. But farther, the appellant now admits he is bound to execute a discharge though not under this action. The respondents do not ask for general relief, nor indeed for more than is concluded for in the summons; but they are entitled to that, under such modifications as the appellant by his defence called for as necessary. The court merely adopted the appellant's own defence, and suggests under what alterations he ought to sign the deed.

The appellant's defences and pleas in the sheriff court shew that his defence was exclusively confined to the deed setting forth erroneously that he was then a director. The deed which the party is now required to sign imports no higher obligation than is contained in the first deed. Instead of giving the respondents more it gives them less, if possible, than they ask. Instead of individual warrandice, as required in the first deed, mere general warrandice is introduced into the second. Besides no plea upon the ground was taken by the

"execute, and deliver to the pursuers the foresaid "discharge and renunciation, to be produced at calling "hereof."

Therefore the whole suit is founded upon this, that a certain instrument had been prepared which the pursuers alleged the defender ought to have executed. They do not ask that he may perform any other duty, or that he may execute any other deed, but they state a certain deed to be produced, and that he ought to be called upon to execute that deed, and the whole of the pleadings proceed upon that supposition. His defence is grounded on the fact, not that he is not bound to give any discharge, but that he is not bound to give a discharge in the terms in which it had been tendered. Thus the contest between the parties is, whether he is bound to execute that deed. The pursuers seem to have been aware of that in bringing before the court a case entitling them to what they ask, and that no doubt was the ground of the application to amend their summons; and accordingly they made an application in due time, the record not being closed, to be permitted to amend. The sheriff was of opinion that ought not to be granted. He "finds that the same is incompetent, "because changing and extending the nature and con-"clusions of the libel: Refuses the motion to amend, "reserving all questions of expenses to the final "issue."

Now whether the sheriff was right or wrong in that opinion I apprehend is not a question which your Lordships are now called upon to consider at all; but I cannot but observe, as applicable to this part of the case, that what the sheriff ultimately did is not very consistent with the reasons he assigns for refusing per-

ich alterations on the deed as may obviate these ›jections, and decerning for execution of the deed › amended. No change would be made on the :tion, but this result would arise from the de- nce, and the court would decern in terms of the ›el as modified by the defence. Is it not the recog- zed rule of law, that, where the nomination does ›t specially stipulate to the contrary, a majority the trustees possess the whole powers of the ust?"

[y Lords, on that the record was closed, and there no complaint made on the part of the pursuers nst the sheriff refusing liberty to amend. Then, on matter coming on again before the sheriff, on the of December, this interlocutor was pronounced:— aving resumed consideration of this process, finds at the defender, having admittedly accepted the fice of one of the directors of the pursuers company, bound at common law, and under the rules of the ›mpany, to execute all writings necessary for the :dinary management of the business of the company, id specially for the transfer and discharge of all ich securities as may have been taken in name of ie said defender, as one of the said company directors, id as such one of the trustees for the company; at finds that the defender, as admittedly no longer a artner, nor, of consequence, a director in the said ›mpany, is not bound to subscribe any deed or riting as may be inconsistent with the said last- entioned fact, and which in any way recognizes him s being, at the time of subscribing the same, a artner in the said company." That was, according ie fact in issue between the parties, the pursuers and

ticular act to be done by one of them, which was claimed to be done by the pursuers, and resisted on particular grounds by the defender,—in which it has been thought competent to a court to adjudicate that the defender was quite right in the resistance he made to the execution of a particular instrument tendered, but the court still went on to direct that another deed should be prepared, and that he should execute the deed so prepared. Non constat, with respect to the deed directed by the sheriff to be prepared and submitted to the defender, that he would not have resisted the execution of it; but the matter was never submitted to his consideration, therefore he never had an opportunity of acquiescing in or resisting such application.

My Lords, this case was brought by advocation before the Court of Session, and the Lord Ordinary took precisely that view of it. Still there was no advocation against the refusal of the sheriff, and for liberty to amend. The cause was brought up entirely on the last interlocutor; and the practice of the court gave the party an opportunity still of putting new matter in issue, if he had thought proper to make an application for the purpose. But on the 23d December 1836 the Lord Ordinary pronounced the following interlocutor: "In respect the record, as "closed in the inferior court, is not objected to, and the "parties having each given in additional pleas in law, "holds the record as closed in this court, and appoints "parties to debate."

Now, what advantage might have been afforded, if such opportunity had been taken, in the advocation, it is not necessary now to consider, because it is conceded on all hands that the act of parliament is imperative on that point, that after the record is closed

als against part of an order, the appeal is open as e rest; and a very convenient rule that is; it saves : expense. That is the whole effect of the decision in ngham's case.

ow, here is an interlocutor not brought under w; the others are; and there is an appeal against lecision on the merits. I cannot but consider that lordships will ultimately come to the conclusion the interlocutor of the Lord Ordinary was the ct one, and that the alteration of it in the Inner se cannot be supported; that there is no reason altering the interlocutor of the Lord Ordinary, so as it disposed of the record. When it came before Lord Ordinary he pronounced this interlocutor: Sustains the reasons of advocation; advocates the ause; recals the interlocutor of the sheriff; finds that he advocator was not bound to sign the only deed which he was called upon by the summons to subcribe; sustains this defence, assoilzies the defender, and decerns; finds him entitled to expenses incurred by him in this and in the inferior court."

On the case coming before the Inner House the urt simply remitted it to the sheriff; but the reasons en by the learned judges on which they founded ir opinion seem to have proceeded very much on supposition that there ought to have been liberty mend. Now, it does not appear to me that that nion was well founded, or that they were correct in king there ought to have been liberty to amend, that therefore it was competent to the court to udicate on the merits as if there had been liberty amend. On the contrary, if it were necessary to end in order to come to that conclusion, that would

and a point on which this House is unwilling to interfere,—inasmuch as those who are in the daily habit of practising in those courts are much more competent to decide what that practice is, than it is possible your Lordships can be on a case of appeal,—it appears to me to be a case that requires great caution and consideration to be exercised before your Lordships would differ in opinion from a judgment pronounced on argument in the court below. But if, on reference to the authorities, it appears that that which has been done by the court below has been contrary to the practice, it will become the duty of your Lordships, if there has been any such departure, to keep that practice within its proper limits; because nothing can be more injurious to pleading in general than the introduction of a laxity of practice, in consequence of an opinion applying to the circumstances of a particular case. It is that which courts in this country are very cautious in permitting; and it is now a very wholesome rule to keep the practice within the limits which the ordinary rules prescribe, and not to make exceptions to it, on account of feelings that exist because one party or another may be thought to be improperly litigious. It is much to be regretted that this expense has been incurred by these parties, between whom there is scarcely any thing in question; still it is your Lordships duty to look to the general question, and the effect of the general practice. There are two or three cases which bear on this subject, which I shall be glad to have an opportunity of looking at, and for that purpose I would propose to your Lordships that the further consideration of this case be postponed.

proceedings against him, and, at the conclusion of the summons, stated these facts:—They stated that the deed was prepared; that the deed was approved by the borrower; that what they asked was, "that the defender "should be decerned and ordained to grant, execute, "and deliver to the pursuers the foresaid discharge and "renunciation, to be produced at calling thereof." He alleged an objection to the deed so prepared, and stated grounds on which he was not compellable to execute, not any deed, but the deed so prepared. The whole cause turned upon that ground, whether that deed was such as the defender was bound to execute. So satisfied were the pursuers in the course of the cause that that was the issue, that they felt no hesitation in coming to the hearing of the cause, praying nothing else against the defender but that he might execute that particular deed.

The cause came on first before the sheriff, and then they applied for liberty to amend their summons, and to plead generally that he should execute that deed, or some other deed for the purpose of operating as a discharge and renunciation of the said debt. The sheriff thereupon disposed of the cause in the manner already stated.

The whole question then, my Lords, was disposed of; there was nothing that was asked by the pursuers but what was disposed of by the finding of the 23d December 1835; the whole suit appears to be at an end; the pursuers having unfortunately limited their demand to call upon the defender to execute that deed, they could have no redress against him for not executing some deed, which, so far as appears, he had never refused to execute. The sheriff

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before had refused to permit an amendment because it extended the object of the suit; but strange as it may appear, in a case where amendments were rejected because they purported to extend the object of the suit, such suit, without any amendment, was considered competent to enable the defender to do that which, according to the decision of the sheriff on the motion to amend, was felt to be subject to objection, as being beyond the object of the suit; and yet the sheriff goes on, and says, "therefore requires the pursuers to delete "from the discharge" such and such words; so that, after finding he is not bound to execute the deed tendered, and that the pleadings cannot be altered so as to comprehend another deed, because it would change and extend the nature and conclusions of the libel, he goes on, and enumerates the objections to the deed, with respect to which there is nothing to be found on the pleadings, except that the defender insists on particular circumstances as furnishing reasons for objecting to the particular deed, and another stating the particulars in which he is of opinion the deed ought to be corrected he directs the deed, so amended, "to be newly engrossed "and produced in process, and thereupon decerns the "defender to subscribe the same;" that is to say, the deed tendered is not a proper deed to be executed; but in this proceeding, which had for its object only to compel the execution of a particular deed, you shall be directed to execute some other deed, though that is so foreign to the purpose, and much larger than the object of the suit instituted for the purpose of procuring his signature to a particular deed.

My Lords, this case, according to the usual practice, having been afterwards brought before the Court of

Session, the Lord Ordinary altered the interlocutor of the sheriff, but the Court recalled his Lordship's interlocutor; and in that shape it comes before your Lordships.

Now, this being a question of practice, however unwilling your Lordships may be to meddle with the decisions of the Court of Session in matters of that kind, and your Lordships are always very slow to interfere with the course of practice of courts of a peculiar jurisdiction having their own rules, the case being brought to your Lordships bar it is our duty to deal with it, and it so happens that not one case can be found that justifies or approaches this case in its principle; on the other hand, several cases are cited, which though they do not correspond exactly in their facts, go a great way to shew that the practice of the Court of Session is much more reasonable than it would be supposed to be according to this decision. I will only call your Lordships attention to three or four of the cases to which reference has been made by the counsel. They all go to the full extent for which they are cited.

The first is, Dickie v. Gutzmer, 6 Shaw and Dunlop, p. 637. The case was of this nature:—The libel stated the liability; the defender having raised a defence, the pursuer by his condescendence stated a new case, leading however to the same liabilities. The question was, whether he was justified in the mode by which he attempted to come to his conclusion; and the court said the pursuer was not at liberty to go out of his libel, and to state a totally different ground of action on his condescendence. The only competent remedy would be an amendment of the summons.

a forged bill. It was held that the party was not enabled to go into proof of that, because it was not consistent with the case he had himself stated.

There is another case referred to in the printed papers, which appears to me also to be of considerable importance on this question; the case of Forbes v. Livingstone, the judgment in which case was affirmed in this House, 8th July 1834. The summons in that action concluded to have it found that certain lands were comprehended within and were parts and pertinents of the pursuer's estate, and that the defender had no right to them. The defender also brought a counter-action of declarator, concluding to have it found that the disputed lands were his property, and that the pursuer had no right to them. There was an adverse claim therefore by the pursuer and by the defender, each claiming the lands. It turned out in the course of the action, that the pursuer in the first summons discovered that he had made an error, and that the lands were not exclusively his, nor exclusively the property of the parties with whom he was contending, but that they were what is called runrig lands, or mutual property. The objection there was the other way. He had made out a case; but as that case was not consistent with the claim in his summons, inasmuch as he had claimed the lands exclusively as his, it was held that he could not support his action. The Lord Ordinary having sustained his right to the extent to which he had proved it, the Court of Session, on the ground that the decree was not warranted by the conclusion, altered the interlocutor; and this is stated to be the reason of the judgment:—"In respect that

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"there appears not to be sufficient evidence to warrant "the finding of the interlocutor, and that the said find- "ings are not applicable to the conclusions of the sum- "mons in the conjoined actions;" and that judgment was affirmed on appeal. The Lord Chancellor[1] of that day observed, he had very little doubt whatever as to the judgment to be given.

All these cases, though none of them are cases exactly similar to the present in their circumstances, clearly apply to the present, and they establish that the courts of Scotland require that there should be consistency between that which is asked and that which the court shall ultimately decree. It is very proper it should be so, and I should very much regret to find the practice of the Courts of Scotland different from that which exists here. Here there is no question that the party would be immediately nonsuited if, proceeding upon one ground, it turned out that he could claim only on another. There is a mode of proceeding in courts of equity whereby, under what we call a prayer for general relief, the court is at liberty to give relief consistently with the case stated; but there the court never give relief inconsistent with the case stated, and if the case stated had been that of the delivery of a particular instrument, and the demand of the execution of that particular instrument, and it turned out that the defendant was not bound to execute that instrument, no court would think of directing the execution, not of the deed itself, but of some other deed which the court should take upon itself to frame and tender to the party.

[1] Lord Brougham, C.

On the other hand, if the complaint had been that he refused to execute the deed tendered, and that he refused to execute any deed, that might have given the court jurisdiction; but if it had been confined in its terms to the complaint that he had not executed a particular deed, no court would take the course adopted in this proceeding, because he had refused to execute the deed itself, of proceeding to alter the instrument, and of decreeing that he should be ordered to execute the deed so altered.

Under these circumstances, my Lords, I cannot but think it would be very unsafe if your Lordships were to affirm the interlocutor appealed from; for that would be binding upon your Lordships and the court, and would necessarily lead to the greatest possible laxity in future proceedings, which could not but produce great injury to the public. I cannot but think that in coming to their conclusions the court were a little too much influenced by the litigious conduct of the defender. I have nothing to say in favour of his conduct; he appears to have given a great deal of unnecessary trouble, and occasioned a great deal of unnecessary expense, in refusing to do that which in some form or other he was bound to do. I very much regret that, according to the course your Lordships are bound to pursue, you are putting the company to additional expense; but they will have their remedy in a proceeding properly framed for that purpose, if the appellant should be advised, or without advice should think proper, to continue the conduct which he has hitherto pursued. The result will be to reverse the interlocutor appealed from, and to affirm the interlocutor of the Lord Ordinary, if your Lord-

[*25th July* 1839.]

(Appeal from the Court of Session, Scotland.)

DAVID BARRY, surviving Partner of Robertson and Barry, Merchants in Leith, (Pauper,) Appellant. (No. 25.)

[*John Stuart—Jemmett.*]

ARCHIBALD WADDELL, Accountant in Glasgow, Trustee on the sequestrated Estate of John Geddes of the Vereville Glassworks, Respondent.

[*Lord Advocate (Rutherfurd)—Sydney S. Bell.*]

Account.—Judgment of Court of Session in a circumstantial case of accounting, affirmed.

2D DIVISION.

Lord Ordinary Moncreiff.

THE nature of this case, which involved matters of accounting which had been the subject of investigation by an accountant, by order of the Court of Session, is explained in the note of the Lord Ordinary subjoined to his interlocutor of the 10th June 1836, adhered to by the court, and in the judgment by the Lord Chancellor affirming that of the court.

There were previous interlocutors, of 20th January 1832 and 8th March 1833, pronounced by the Lord Ordinary. Upon hearing parties on their objections to the accountant's report, the following interlocutor was pronounced by Lord Moncreiff:—"10th June 1836. "The Lord Ordinary, having heard parties procurators

d David Barry, sustains the defences, and assoil- the defenders, and decerns; reserving always, as esaid, the right of any creditor of the said com- y, the compositions on whose debts may not have n paid, and others having interest, to call the said n Geddes to account for his intromissions had or e had with the estates of the company, or the ners, and in particular the heritable property and ts above referred to, posterior to the said 30th June 4. as aforesaid, or in time coming: Finds, that as personal decree can be pronounced against the d David Barry, it appears to the Lord Ordinary be unnecessary to give any deliverance on the penses of process, the said David Barry having one carried on the litigation; but allows the cause o be enrolled, in order that any motion which may e necessary for finally extricating it may be made.

"(Signed) JAMES W. MONCREIFF." [1]

Note.—This cause, which began in 1817, and relates to affairs which e in a great manner closed in 1804, has proceeded under the old ns of the Court; and when the Lord Ordinary looks at the process g before him, he sees a warning example of the evils which have e called for and obtained a remedy.

he cause does also, in his opinion, present a notable example of the nt of trouble and vexation which a man may bring on himself and rs, to whom he stood under the greatest obligations, from indulging ere humour of dissatisfaction, originating in circumstances in which ad himself the chief concern, and in regard to which, at any his opponent was perfectly innocent. Mr. John Geddes and his ner had the misfortune, from motives of friendship, to interpose credit as cautioners for Mr. Barry and Mr. Robertson, in a com- ion-contract with their creditors. At their own desire, these lemen were at first allowed to manage the bankrupt estate; but quarrelled with one another, and it was then necessary to put the agement in Mr. Masterton, accountant. Mr. Robertson continued ive assistance, but Mr. Barry refused to do so. The management t on, however, and in 1804, Mr. Masterton made up his final states, nst which no specific objections were stated. Mr. Masterton left

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The appellant reclaimed to the court, praying for absolvitor in Geddes's action, and, in the accounting at

Statement.

"this country in the same year 1804, and Mr. Robertson died abroad "in 1807. From that time down to 1817, no proceedings took place. "In that year Mr. Geddes, finding himself to be in advance for the "estate, and seeing that some of the compositions were still unpaid, "found it necessary to obtain a decree of constitution against the heirs "of George Robertson, no one representing him, by which he might "obtain a title to the heritable property which had belonged to him, "and the price of which, though it was sold, could not otherwise be "recovered. That summons necessarily called the defender Barry, and "unfortunately concluded for a sum which has been found by the "accountant to be extravagant and untenable. But the pursuer, by the "minute mentioned in the interlocutor, passed from any personal decree "against Barry. The latter, however, had raised his action, concluding "for upwards of 5,000*l.*, on an account framed on the principle of dis-"carding all Mr. Masterton's accounts and states; and after thirteen "years, when Masterton and Robertson were both gone, refusing to "Mr. Geddes credit for any thing, unless all the books, vouchers, &c. "should be of new opened and exhibited. No creditor has made any "claim. These causes have now been nineteen years in court; and "Mr. Geddes, thus struggling with a bankrupt on the poor's roll, has "himself become a bankrupt.

"The Lord Ordinary having read with care the whole report, and "attended to all the objections to it, is completely satisfied that the "accountant has done full and fair justice. 1st. He thinks that he "judged rightly, seeing that no personal decree was asked by Geddes, "and that he was in a litigation with a party on the poor's roll, in "proceeding, for the reasons explained in pages 10 and 11 of the "report, to endeavour to ascertain whether the documents in process "were sufficient to show that there was a debt of any amount due to "Geddes. 2dly. He thinks that he has done justice in giving the weight "which he has done to the states of Masterton, which were examined "and approved of by so many persons having interest, and fully qualified "to check or appreciate them. 3dly. He is of opinion, that the report "itself contains sufficient answers to all the special objections now "insisted on. It is therefore unnecessary for him to go into particulars. "Many of the objections put before the accountant were palpably untrue "and unfair; some were given effect to, and the rest seem to have been "rightly decided.

"One objection (the eighth before the accountant, and the tenth now "insisted on) might afford reasonable ground of doubt. Robertson, "Mr. Barry's partner, and one of the bankrupts, gave assistance to "Mr. Masterton in realizing the estate; and he appears to have received "a sum of 335*l.*, which he did not pay over to Masterton. The question "is, Whether, in a question with Barry, Geddes the cautioner must be

his own instance against Geddes, for decerniture with costs, "or at least to recal the said interlocutor in hoc "statu, and remit to the Lord Ordinary to make up a "record in terms of the judicature act, and relative "act of sederunt."

Against that part of the interlocutor, whereby his Lordship "finds, that as no personal decree can be "pronounced against the said David Barry, it appears "to the Lord Ordinary to be unnecessary to give any "deliverance on the expenses of process, the said David "Barry having alone carried on the litigation," the respondent presented a reclaiming note; and prayed the court to "find the said David Barry liable in said "expenses, at least from 22d January 1822, the date "of the minute referred to in the Lord Ordinary's "interlocutor, or to do otherwise in the premises as to "your Lordships may seem proper."

"liable for what Robertson so received and did not account for? The "Lord Ordinary thinks that the accountant is right in his judgment, "as explained in the report, p. 67. Robertson was not factor for "Geddes. But, at any rate, the point by itself is really of no import- "ance. The sums employed by Robertson, in payment of the third "instalment of the composition, and otherwise, must be set against "the sum so received, which would reduce it to 143*l.* 9*s.* 1*d.* But as "no personal decree is asked, this could evidently make no real difference "on the state of the case.

"Mr. Barry insists much on what is the first objection before the "accountant, and the seventh now pleaded. This is 186*l.* paid by "Mr. Geddes to take up a bill of a creditor who refused to accede to "the composition. The Lord Ordinary can only say, that any thing "more unfair or discreditable, to be advanced by Mr. Barry, after so "long a period, in the face of his own letter at the time, (29th July "1803,) as quoted by the accountant, p. 61, and of Masterton's state "approved of by Robertson and the creditors, he has seldom seen; and "he cannot think that it can be listened to, coming from Mr. Barry in "such circumstances.

"The Lord Ordinary thinks it unnecessary to advert to any of the "other objections.

"J. W. M."

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Judgment of Court, 16th May 1837.

On advising both the reclaiming notes the following interlocutor was pronounced: "The Lords, having "considered this reclaiming note for poor David "Barry, and another note for Archibald Waddell, "reclaiming against the same interlocutor as to the "expenses of process, adhere to the interlocutor in so "far as complained of in this note, and refuse the "desire thereof; and on the other note, find David "Barry liable in the expenses of process, from the date "of the remit to the accountant; allow the account to "be given in, and when lodged, remit to the auditor to "tax the same, and report, in so far altering the inter-"locutor of the Lord Ordinary."

Barry appealed.

Appellant's Argument.

Appellant.—The course of procedure below had been such as to baffle every attempt by the appellant to get into the real truth and merits of the transaction.

Respondent's Argument.

Respondents.—The respondent maintained that the proceedings, not having admitted of the application of the modern forms of pleading, presented much to be animadverted on; but that substantial justice had been done, and every facility of investigation afforded by the accountant's report, which had undergone the judicial review of the Lord Ordinary and the Court.

Ld. Chancellor's Speech, 18th July 1839.

LORD CHANCELLOR.—The objections to the account are all to be found on the face of the account itself; there is no evidence dehors the account?

Mr. Stuart.—The first objection is printed in the accountant's report at page 25, and afterwards at page 42. My Lords, at page 42 it is perhaps more explicitly

d, because there the objections are narrowed and conveniently printed.

RD CHANCELLOR.—Does that appear on the face report?

Stuart.—Yes, my Lords.

RD CHANCELLOR.—Your four objections are obns to the course the accountant has taken on the as they appear on the face of the report. There evidence dehors the report.

y Lords, in this case, which is an appeal against interlocutors of the Court of Session, the two first ctions appear to me to be without any foundation; two latter depending entirely on an examination of account, it may be proper to take some time to estigate the account, and the entries on which the jections depend; but the two first are for not having de an order on an application by the appellant, for ich I cannot find on the face of the proceedings, or on y thing that is stated at the bar, that there was any ndation. In the course of the contest between these ties it was referred,—the whole matters of account e referred,—to an accountant by an interlocutor of year 1830, and against that there is no appeal. The rlocutor, therefore, is binding on the party; and the question is, whether in carrying that into effect the ountant has or has not done his duty which the court nded he should do,—that is, whether there has been iscarriage in the mode in which he has performed the y which the interlocutor imposed on him. The two t interlocutors do not touch that part of the question. ey are appealed against as interlocutors of the Court of ssion refusing the application requiring certain special rections to be given to the accountant as to the mode

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in which he was to carry out the account, an application inconsistent with the interlocutor of December 1830, which directed him to take the account generally. I do not find any ground laid before the Court of Session to induce that court to depart from the direction of the interlocutor of 1830, therefore there is no ground for the appeal against the order which refused that application.

My Lords, the other two interlocutors, that is to say, the third, which disposed of a complaint against the mode in which the account was taken, and the fourth, which gave effect to the decision of the Lord Ordinary, is a subject involving a question of account, which appears entirely on the face of the account. In a complicated case of account it would not be satisfactory to dispose of a question of that sort without taking an opportunity of accurately examining the account itself; and for that purpose I propose to your Lordships to adjourn the consideration of this case till Monday next, it being then considered that the two first interlocutors are to be affirmed, and the question to remain open on the two last, which raise the question of the account.

Ld. Chancellor's Speech, 25th July 1839.

LORD CHANCELLOR.—My Lords, I do not feel it to be necessary to trouble your Lordships at any length in this case, having in fact stated my views at the close of the argument. It appears that the appellant Mr. Barry and his partner Mr. Robertson, who had been merchants in Leith, became insolvent in the year 1801. The partnership property was sequestrated, and a trustee elected, but the bankrupts having offered a composition of seven shillings and sixpence in the pound by three several payments, the offer was accepted on condition of sufficient security being given for the first and

second payments. The Messrs. Geddes accordingly became cautioners for the payment of those instalments, in consideration of which the whole of the sequestrated estate and effects was conveyed to them, and the sequestration was recalled. The Messrs. Geddes, residing at Leith, appointed Mr. Masterton their factor, and he made up statements from time to time of the monies he had received and expended on account of the estate. Whatever came in from the original estate beyond that which was necessary to indemnify the trustees in the payment of that 5*s.* in the pound, on the debts to the firm, would of course immediately go to the insolvents, or those who stood in their place. That trust continued for a great number of years, during which time statements of the acts and transactions were furnished for the inspection of those interested in the cause; they investigated the concerns of the general firm, which are represented to have remained in the hands of Robertson, the late partner; afterwards another person was appointed to get in the property, and ultimately the present appellant, Barry, obtained from the creditors an assignment of all their interest, so that at last he came to represent those interested under the sequestration; and under these circumstances he has called in question accounts of Messrs. Geddes with the creditors of the bankrupt estate. It was contended that he had no interest, because the creditors under the sequestration had no interest except for the purpose of seeing that there was a due appropriation to the payment of those instalments of 2*s.* 6*d.* each in the pound, making 5*s.* in the pound,—it is in the first instance to themselves, and ultimately to the creditors interested under them. There was another suit by Messrs. Geddes, for the purpose of estab-

On the other hand, if the complaint had been that he refused to execute the deed tendered, and that he refused to execute any deed, that might have given the court jurisdiction; but if it had been confined in its terms to the complaint that he had not executed a particular deed, no court would take the course adopted in this proceeding, because he had refused to execute the deed itself, of proceeding to alter the instrument, and of decreeing that he should be ordered to execute the deed so altered.

Under these circumstances, my Lords, I cannot but think it would be very unsafe if your Lordships were to affirm the interlocutor appealed from; for that would be binding upon your Lordships and the court, and would necessarily lead to the greatest possible laxity in future proceedings, which could not but produce great injury to the public. I cannot but think that in coming to their conclusions the court were a little too much influenced by the litigious conduct of the defender. I have nothing to say in favour of his conduct; he appears to have given a great deal of unnecessary trouble, and occasioned a great deal of unnecessary expense, in refusing to do that which in some form or other he was bound to do. I very much regret that, according to the course your Lordships are bound to pursue, you are putting the company to additional expense; but they will have their remedy in a proceeding properly framed for that purpose, if the appellant should be advised, or without advice should think proper, to continue the conduct which he has hitherto pursued. The result will be to reverse the interlocutor appealed from, and to affirm the interlocutor of the Lord Ordinary, if your Lord-

that I should move your Lordships to affirm the interlocutors complained of; there can be no costs, as the party sues in formâ pauperis.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

A. DOBIE—ARCHIBALD GRAHAME, Solicitors.

1st Division.

Lord Ordinary Fullerton.

THIS was a branch of a long-pending litigation between the same parties relative to a right of salmon fishing in a part of the river Conon. This litigation commenced in 1825, by a summons of declarator and damages, at the instance of the respondents, under which the question came to be, whether two valuable pools in the above river, called Pool Oure and Pool Breakenord, belonged to the appellants or to the respondents? It was ultimately decided by the Court of Session, on 11th July 1832, and by the House of Lords, 12th April 1834, that these pools belonged to the respondents, and they have since then been in their possession. For the greater part of the period, during which this question continued in dependence, these pools were allowed to be possessed by the appellants, under an order of court which enjoined them to keep an account of the number of salmon caught till the final issue of the cause. In consequence of the judgment above mentioned in 1834, the respondents raised an action, concluding that the value of the fish caught by the appellants beyond their own boundary as ultimately established during the dependence of the litigation should be accounted for and paid to Captain Munro, the tacksman of the fishings.

To this action the appellants in their four first pleas pleaded, that on a true construction of the judgments pronounced, the pools had actually been adjudged to belong to them and not to the respondents; and to aid the appellants in this plea, they raised two successive actions of declarator to have it so found and declared, but which were both dismissed with expenses; and the defence rested on this plea was thereupon abandoned.

The appellants however further contended that they

" there does appear to the Lord Ordinary strong ground " to presume that that liability was contemplated both

following was the judgment:—" 24th Jan. 1778. On the report of " the Lord Auchinleck, and having advised the informations, hinc inde, " the Lords find that the commissioners of the annexed estates have " not produced a sufficient title to the fishings of the river Conon; " but find that the magistrates and town council of Dingwall have " produced a sufficient title to the fishings in the said river opposite " to their property from the march at Breakenord down to the sea; " therefore, not only assoilzie the said magistrates and council from the " action against them brought by the said commissioners, but decern to " the effect foresaid in the action at their instance against the said com- " missioners, and declare accordingly."——The point at issue in the action, which gave rise to the present dispute, was the precise position of the march at Breakenord; and in this action the following interlocutors were pronounced:—" 9th March 1826, the Lord Ordinary, having heard " parties procurators, ordains the defenders to keep and preserve an " account of the number of salmon to be hereafter caught by them or " their fishermen in the river Conon, all as craved in the foregoing minute, " reserving all questions touching the expenses of clerks or otherwise, in " consequence of carrying this order into effect. *J. Clerk.*"——" 3d June " 1826. The Lord Ordinary, at desire of the procurator for the pursuer, " ordains the defenders to keep and preserve an account of the number of " salmon caught by them or their fishermen in that part of the river Conon " called the New Pool, (further up the river than Pool Breakenord) and that " in place of the account ordered to be kept by them by the interlocutor of " the 9th of March last; reserving all questions touching the expenses of " clerks or otherwise, in consequence of carrying this order into effect. " *J. Clerk.*"——" 14th June 1827. Ordains the defenders instantly to " produce in the clerk's hands the account of the number of salmon " caught by them or their fishermen in that part of the river Conon " called the New Pool, and ordered to be kept by them by the inter- " locutor of the 3d of June 1826. *J. Clerk.*"——" 24th November 1827. " The Lords having resumed the consideration of this note, and heard " the counsel for the parties, they recal the interlocutors of Lord Eldin, " Ordinary, complained of, and remit to Lord Corehouse, Ordinary, in " place of Lord Eldin, to proceed in the cause as to his Lordship shall " seem proper, reserving all questions of expenses until the issue of the " case. *C. Hope*, I.P.D."——" 11th March 1828. The Lord Ordinary " having heard counsel for the parties upon the whole cause, and in particular " upon the demand now made for an interdict against the defenders to " fish above the march between the lands of Balblair and Breakenord, in " respect it is averred that the defenders have been fishing above the said " march, which, by their admissions on the record, they are not entitled " to do, in the meantime prohibits, interdicts, and discharges the said " defenders, or any of them, their tenants, servants, fishers, or dependents, " from fishing or killing salmon in any part of the river Conon above the

he passages quoted from the defenders answers to he pursuers petition for interim execution after the

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d Breakenord, and that it is not now competent to inquire in what sense ese words were employed in the interlocutor in the former process of th January 1778: Finds, that as the parties are now agreed as to e precise situation of the march betwixt these lands, it is unnecessary inquire further into this matter; and that the line so agreed upon rms, where it touches the river, the western limit of the fishings be-nging to the defenders; but in respect the march so ascertained does t correspond with the line delineated on the old plan of 1763 angster's plan, on which the judgment of 1778 proceeded) as the rch betwixt Balblair and Breakenord, recals the interdict imposed by e interlocutor of 11th March 1828, and decerns; that justice, how-er, may be done to the pursuers in case this interlocutor should be ered, ordains the defenders to keep an account of the number of . mon taken by them in the pools named Pool Oure and Pool Breake-rd, from this time till the final determination of this point in the use: Finds the defenders entitled to the expenses incurred by them bsequent to the interlocutor of the Court of 20th January 1829. *Lex. Irving.*"——" 17th June 1831. The Lords having advised this claiming note, and heard the counsel for the parties, they recal the terlocutor reclaimed against (except in so far as it recals the interdict), d find that it is competent to inquire in what sense the words 'the march at Breakenord' were used in the decree 1778. For that pur-se, allow the parties to give in cases on the import of the evidence in ocess, so far as concerns this point, and in particular on the import of e proof led, the pleadings and other proceedings in the cause on hich the decree 1778 proceeded; said cases to be lodged on the cond box-day in the ensuing vacation, and appoint said cases to be vised, printed, and boxed by the third sederunt day in November xt, reserving all questions of expenses. *C. Hope*, I.P.D."

dgment of the House of Lords in the first petition and complaint:— Die Lunæ, 11° Julii 1831. After hearing counsel, &c., it is declared by e lords spiritual and temporal in parliament assembled, that the mention Pool Oure and Pool Breakenord in the said interlocutors complained shall not prejudice, bind, or at all affect the question touching the ourse of the boundary line, nor decide whether the said line runs below above the said two pools; and that, with the above declaration, it is dered and adjudged that the interlocutors complained of in the said ppeal be and the same are hereby affirmed; and it is further ordered, hat the cause be remitted back to the Court of Session in Scotland to proceed therein as shall be just, and consistent with this judgment. (Signed) *W. Courtenay*, Dep. Cler. Parliamentor."

After several years litigation this question was finally settled, by the dgment of the First Division, in these terms:—" The Lords (11th July 1832) having resumed consideration of this reclaiming note, with the

"defenders; find that they are bound to account in "terms of the conclusion of the libel, and decern accor- "dingly; find the defenders liable in expenses, appoint "an account thereof to be given in, and remit the same "to the auditor to tax and report. Quoad ultra, remit "to the Lord Ordinary to proceed with the case. "Signed 7th July."

The defenders appealed.

Appellants Argument.

Appellants.—Possession of the disputed subjects for at least thirty years does in law raise the defence of bonâ fide possession, and is a conclusive answer to the claim for bygone fruits. In the leading case of Agnew [1], some of the opinions delivered, particularly the opinion of Lord Glenlee, afford valuable authority as to the general nature and foundation of the defence of bonâ fide possession. As the respondents are, in the present case, claiming restoration of the bygone fruits or issues of the property which have been reaped and consumed, it lies, of course, upon them to prove that there was mala fides on the part of the appellants, who were in the occupancy and possession of the subjects.

The appellants were so far from being in the situation of reaping the fruits of the subject under a conscientia rei alienæ, that the Court itself, at one time, determined the matter in their favour. They refer to the interlocutor of Lord Newton, Ordinary, of 11th March 1831, by which they were restored to the possession of the disputed pools, and the respondents subjected in a

[1] Agnew v. Earl of Stair, 22d July 1828, Wilson and Shaw's Appeal Cases, vol. iii. p. 296.

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"from the carelessness of the pursuers (respondents), "the defenders in the former action, and as very great "doubts have arisen in consequence of the ignorance "of the parties as to the real extent of their rights, "that ought to be done (the affirmance of the judg- "ment) without any costs."

Respondents Argument.

Respondents.—The judicial challenge in 1825, and the orders of the Court thereupon, that an account of the number of fish should be kept, put the appellants in malâ fide in consuming the fruits of their illegal possession.

The principles by which the defence of bonâ fide possession are regulated have been clearly laid down by the institutional writers.[1]

The defence of bonâ fide possession can never be sustained, where, after a judicial challenge of the party's right has been brought he has been ordered by the judge to keep an account of the whole proceeds of the subject, with a view to an ultimate accounting, in case his antagonist should be successful. From that time forward he cannot, in reason or common sense, consider these proceeds as his own. He is, in truth, possessing for the benefit of both parties, and not for his own exclusive benefit. Accordingly, there is no case to be found in which, notwithstanding such an order and such a course of possession, the defence of bonâ fide possession has been sustained to the exclusive benefit of the party possessor.

Such a doctrine, indeed, would be altogether inconsistent with the almost invariable practice of the Court in similar questions in making such orders upon one or

[1] Stair, b. ii. tit. 1. sect. 23.; Ersk. b. ii. tit. 1. sect. 25., end.

parties were let to the same lessee, evidence of their boundary was not preserved.

In 1825 the respondents commenced a suit, complaining of the appellants fishing in pools of the river beyond their limits, and particularly in Pool Oure or New Pool. The respondents insisted upon their rights to fish thus, under the interlocutor of 1778, contending that the march at Breakenord, described in the interlocutor of 1778, was above and not below the place in dispute. By an interlocutor of Lord Corehouse, of the 12th November 1828, affirmed by the Court 20th January 1829, it was declared, "that the words 'opposite to their pro-"perty,' in the judgment of 1778, were demonstrative "and not taxative, and therefore the Court found that "the magistrates of Dingwall (in the words of the "judgment) have a sufficient title to the fishings in the "river Conon from the march at Breakenord down to "the sea; but, in respect parties are not agreed as to "the march between the lands of Balblair and Breake-"nord, appoint the pursuers to put in a condescendence "upon that point."

The introduction of the new term, "the march be-"tween the lands of Balblair and Breakenord," supposed at the time to be synonymous with the term "the march of Breakenord," gave rise to new difficulties. At last, after an appeal to this House, the interlocutor of the 11th July 1832 was pronounced, which finally fixed the position of the march of Breakenord as being between Pool Oure or New Pool and Pool Breakenord, and thereby decided the boundary in favour of the respondents, and this interlocutor was affirmed in this House on the 12th April 1834.

It having been held, that it was not competent for

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the respondents to claim compensation in that suit in which those proceedings took place, for the invasion of their ascertained rights during the dependence of the action, the present suit was instituted for that purpose. The appellants, in their defences, attempted to open the question of boundary, and also insisted that should the question of right be otherwise, they, having been bonâ fide possessors, were not therefore liable to account for damages. By an interlocutor of the 11th March 1837 all the defences, except the last, were repelled, and this interlocutor not having been appealed from is conclusive. By an interlocutor of the 6th of July 1837 the defence of bonâ fide possession was also repelled, and the appellants were ordered to account in terms of the libel. From this interlocutor the appeal is now brought. The question therefore is, whether the appellants are bound to account for the profits of the fishings in this part of the river, to which it has been decided that they are not entitled, or whether they are to be protected from such account by the rule in the law of Scotland as to bonâ fide possession.

In considering this question it is necessary to attend particularly to several proceedings in the former suit, to which I have not before adverted. By an interlocutor of the 9th March 1826 the appellants were ordered to keep and preserve accounts of the number of salmon caught by them in the river generally; but this was, in June following, altered, and confined to that part of the river called New Pool. On the 11th March 1828 the appellants were interdicted from fishing in any part of the river above the black line in Sangster's plan; but it being disputed what part of the river the black line represented, another interlocutor of the 11th of July 1829 was pro-

nounced, by which the interdict was renewed, prohibiting the appellants from fishing in Pool Oure and Pool Breakenord, and directing the respondents to keep an exact account of the fish caught in these two pools, which assumes that these two pools were considered as being protected by the interlocutor of the 11th of March 1828. Upon this, the respondents obtained possession of those two pools, and kept possession till March 1831. By another interlocutor possession of those pools was again delivered to the appellants but (in the terms of that interlocutor), that justice might be done to the respondents in case that interlocutor should be altered, the appellants were ordained to keep an account of the number of salmon taken by them in Pool Oure and Pool Breakenord.

After the first decision of the right in 1832, the respondents applied for interim execution and possession of the pool, but it was by consent, on the 17th January 1833, ordered that the application should be refused, the appellants being still obliged to keep an account of the number of salmon taken by them in those two pools, till the final determination of the cause. It has been suggested, as the reason for leaving the appellants in possession subject to account, that they, having no right of fishing higher up the river, were interested in obtaining all the fish they could from those places; whereas if the respondents were put in possession subject to account, they might neglect the fishings in those places altogether, trusting to catch the fish higher up. It is obvious that in making these several orders as to keeping accounts, the Court contemplated having the means of giving to the respondents, if their right should

in the judgment of 1778, and below Pool Breakenord, and beyond all question below Pool Oure. The appellants must have known that they had no title above the march at Breakenord; what point was intended to be included in that description was one that became doubtful, but it was a mere question of fact. Upon that doubt as to the fact they assumed the right of fishing in Pool Oure and Pool Breakenord, above both the line marked in Sangster's plan, and the place called Breakenord, an assumption inconsistent with any assignable position of the march at Breakenord. Besides which, the confusion of boundary, so far as it existed, appears to have arisen from the town having let their fishings to the same person who was lessee of the fishings immediately above and contiguous to these, for it appears that the lease from the proprietors of the respondents lands was of an earlier date than that from the town. Whether under such circumstances the principle of bonâ fide possession could be pleaded, is important only to those periods and to those parts of the river as to which the direction to keep account did not apply, which is but a small part of the case. No authority has been cited to show that it can be set up in such a case. The Court of Session has decided that it cannot. It would, I think, be most unjust that it should, and I therefore cannot think that your Lordships will lay down any such rule.

As to those parts of the case which are included in the direction to keep accounts, it would be a fraud upon the pursuers and upon the Court to give effect to such a defence. The condition by which the Court was guided with respect to the possession was, that the party

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in possession should keep an account; this necessarily implied that the result of the account so kept should be dealt with as the Court should think fit ultimately to direct, and necessarily excludes every principle upon which the doctrine of bonâ fide possession is founded.

It was contended for the appellants that this case ought, under the Judicature Act, to have been sent in the first instance to a jury; for that I see no ground whatever; this is not a case of quasi delinquency, where the conclusion is for damages only, it is a subject of account arising out of the right as established in the former suit. There is no question of fact to be tried. This appeal appears to me to be a very unnecessary prolongation of the contest which has so long subsisted between the parties, and a very unfortunate addition to the expenses attendant upon it, and which, if successful, would be productive of great injustice.

For these reasons, and being of opinion that the judgment of the Court below is not one open to any substantial objection, I move your Lordships to affirm the interlocutors appealed from, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of

Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

MAGISTRATES OF DINGWALL and others v. MUNRO and another.

29th July 1839.

RICHARDSON and CONNELL — DEANS and DUNLOP, Solicitors.

[1*st August* 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 27.) MRS. CATHERINE CAMERON LOGAN or GILL, residing at Hillend near Airdrie, Widow of the deceased Captain Henry Gill, sometime of the 50th Regiment of Foot, Appellant.

[*John Miller — W. Dauney.*]

MARGARET LOGAN, only child and nearest and lawful heiress of line and of tailzie and provision of the deceased John Maxwell Logan, Esquire, of Fingalton, and her Trustees and Tutors, Respondents.

[*A. M'Neill — G. Robinson.*]

Entail—Institute—Life-rent and Fee—Service.—A party, by deed of entail, disponed his lands "to and in favour of M. "in liferent only, during her lifetime after me, and to the "second son to be lawfully procreated of her (M.'s) body, "and the heirs to be lawfully procreated of his body, "whom failing," to other parties "heritably and irredeem- "ably." The deed provided that "the second son of the "said M., and the other heirs substitutes," should bear the entailer's name and arms; the cardinal prohibitions, and relative irritant and resolutive clauses, were directed against "the said M., or any of the heirs aforesaid." J., the second son of M., was not born till some time after the entailer's death. Upon his attaining majority he expede a general service as nearest and lawful heir of entail and provision to the entailer, and a title was completed in favour of M. in life-rent only, and himself in fee. In a question betwixt J. and a substitute heir,—Held (affirming the judgment of the Court of Session), 1. that

the fetters had not been effectually imposed on J. the institute.

Held, 2. that if a party be, by the terms of a deed of entail, the first beneficial taker of the fee, he is the institute, although, by the conception of the destination, the fee would appear to be in pendente between the death of the entailer and his birth, without supposing a fiduciary fee in a party having a previous life-rent.

Held, 3. that a party who is institute by the terms of an entail does not, by expeding a service as heir of tailzie and provision to the entailer, and making up his title under the entail, debar himself from pursuing a declarator of his immunity as institute from the fetters of the entail.

1st Division.

Ld. Ordinary Corehouse.

BY disposition and deed of entail, dated 14th February 1793, and recorded in the register of tailzies 14th November 1819, John Maxwell esq., of Fingalton, on the narrative of the love and regard which he bore to Mrs. Margaret Baird, his spouse, "and for the affection "I have for Mrs. Margaret Mitchell, spouse of Walter "Logan junior, merchant in Glasgow, who lived in "my family from her infancy to her marriage, and it "being always my intention that she should succeed me "in my estate after my death, and for many other "good causes and considerations me hereto moving," under the provisions, conditions, reservation, and power and faculty therein mentioned, gave, granted, assigned, and disponed from him, and all others his heirs and successors, "to and in favour of the said Margaret "Mitchell, in life-rent only, during her lifetime after "me, and to the second son to be lawfully pro-"created of her body, and the heirs to be lawfully pro-"created of his body; whom failing, other substitutes, "heritably and irredeemably, all and whole," the estate of Fingalton, therein particularly described:

intent, and meaning of the said entail, as well as the sound and true legal construction of the expressions therein contained, the whole provisions, declarations, restrictions, and fetters thereof, apply to the said John Maxwell Logan, defender, as institute or first person called under the said entail, and that the said John Maxwell Logan has no right to sell, alienate, dispone, or otherwise burden the said estate, whereby the same may be evicted from the said series of heirs called to the succession thereof. The statement in John Maxwell Logan's summons (signeted 21st March 1834) was almost in terms the same as in the other summons, but containing ane converso conclusion. A supplementary summons, calling the whole heirs substitutes, and containing similar statements and conclusions, was afterwards brought by John Maxwell Logan.

In their condescendence the substitute heirs set out the terms of the service and of the deeds constituting John Maxwell Logan's title, which were in comformity with the terms of the entail; and the two following pleas in law were stated by them on the record:—

1. From the peculiar structure and terms of the deed of tailzie libelled on, the pursuer, Mr. Maxwell Logan, is not a proper institute in the conveyance. On the contrary, as he was not in existence at the date of the tailzie, his mother, Mrs. Margaret Mitchell or Logan, was the fiduciary fiar to whom the estate was in the first instance conveyed; and the fetters being applied to her expressly, and her successors, necessarily applied to John Maxwell Logan.

2. His proper character under the tailzie in question is that of an heir; and having made up a title to the estate by service, and been retoured, "proximus et

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Statement.

" legitimus hæres talliæ et provisionis demortui Joannis " Maxwell," he cannot, while that title subsists, maintain that he is not an heir, or maintain any plea inconsistent with that character.

The Lord Ordinary ordered cases, and thereafter pronounced the following interlocutor, adding a note:—

" 27th May 1836.—The Lord Ordinary having con-
" sidered the revised cases for the parties, with the
" record, productions, and whole process, in the action
" and supplementary action at the instance of John
" Maxwell Logan, decerns in terms of the conclusions
" of the libels; and in the action at the instance of
" Mrs. Catherine Cameron Logan or Gill, assoilzies the
" defender, and decerns; and in these conjoined actions,
" finds the said John Maxwell Logan entitled to ex-
" penses, and remits to the auditor to tax the account
" thereof when lodged, and to report."

" *Note.*—The Lord Ordinary hopes that it is no
" longer necessary to state the grounds of a judgment
" finding that the fetters of an entail, imposed upon
" heirs only, do not bind the institute. If it be, no
" point in the law of Scotland can be held as settled.
" The attempt to show that John Maxwell Logan is
" not the institute, but an heir of entail, it is thought,
" has entirely failed. The estate is conveyed to his
" mother in life-rent, for her life-rent use only, and to
" her second son; the fee vested in the second son,
" John M. Logan, ipso jure, as soon as he came into
" existence as institute. No fee could be transmitted
" to him from his mother; if he served heir to her, it
" was for the purpose not of acquiring, but of declaring
" a right to the estate. None of the decisions cited by
" the substitute heirs bear upon the case."

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The appellant reclaimed, and pointed out a mistake in the Lord Ordinary's note as to John's service to his mother instead of the entailer. The Court pronounced the following interlocutor:—

Judgment of Court, 20th Dec. 1836.

" 20th December 1836.—The Lords having advised " this reclaiming note, and heard counsel, recal the " interlocutor reclaimed against, in so far as it finds " expenses due to Mr. Logan; quoad ultra, adhere to " the said interlocutor, and refuse the desire of the " reclaiming note, and find that the expense of this " process must be paid from the entailed estate of the " pursuer, John Maxwell Logan; appoint the account " of expenses incurred by the said George Logan and " others to be given in, and remit the same to the " auditor to tax the same, and report."

Mrs. Gill appealed; and John Maxwell Logan having died, appearance was made for his infant daughter and representative as respondent.

Appellant's Argument.

Appellant.—If John Maxwell Logan was the institute under this entail, the respondents were clearly entitled to found on the Duntreath class of cases. But the question raised is, whether he is not an heir, and must necessarily take as such? and in reference to this question there are two points to be made for the appellant, both depending upon nice and difficult questions of law.

1. Was John the institute or an heir? The disposition was to Mrs. Mitchell in life-rent, and to her second son and a series of other heirs; John the second son not having been born at the death of the entailer, the fee necessarily devolved on some party, as it could not remain in pendente. The institute has been always

meet the difficulty in the present case, for there the children were in existence at the death of the testator.

2. That it is only in the character of heir of entail, as distinguished from the institute, John Maxwell Logan could acquire a title to the estate, is proved by the manner in which he made up his title. As institute he did not require a service to entitle him to take up the procuratory; unless he was heir of entail he has not acquired a title to the estate at all.

Erskine[1] explains, as to making up titles, that substitute heirs cannot take up the succession as heirs of the disponer, but must succeed as heirs of the disponee. In the Seaforth case the party claiming to be institute had completed her title by service as heir, and feeling the importance of the step, afterwards attempted to disregard that service. Although the decision did not depend upon that service, still the mode of completing the title was held properly to weigh with the judges, as is plain from Lord Glenlee's opinion at the advising, on 24th November 1818. The title in John being that of heir, he could not by this process get quit of that title and assert a different character.[2] [The *Lord Chancellor* directed the attention of the appellant to the terms of her own summons, which set forth the legal character of John, as that of institute, both parties indeed so stating the fact, and asking a declaratory

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[1] Ersk. b. iii. tit. 8. s. 31.

[2] (*Effect of Service.*)—Ersk. b. 3. tit. 8. sec. 63. and 73.; 2 Bell's Illustrations, 427; Bell's Princip. 781; Ersk. b. 3. tit. 8. sec. 31.; Blackwood, Kilk v. Sasine, Mor. 14327; Ayton v. Ayton, 7th July 1784, Mor. 9732; Peacock v. Glen, 22d June 1826, F. C., and S. & D.; Colquhoun v. Colquhoun, in the House of Lords, 17th Feb. 1831, 5 W. & S., and in C. of S., 8th July 1831, Fac. Coll., and S & D.; M'Kenzie v. M'Kenzie, 24th Nov. 1818, F. C., Lord Glenlee's Opinion therein.

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finding by the Court how far, as institute, he was fettered by the entail.] The appellant referred to the pleas in law upon the record as raising the points now argued.

Respondents Argument.

Respondents.—In the mutual declarators, both parties, in the subsumption and conclusions of their summonses, set forth that John was the institute, and asked the Court to declare whether the fetters of the entail were effectually imposed on him. The present case is clearly within the rule settled in the Duntreath case, and recognized in the series of decisions[1] commencing with the case of Findrassie in 1752, and ending with that of M'Gregor Murray, affirmed in the House of Lords in 1838.

The term "institute" clearly applies to the party who first takes beneficially. A mere supposition or

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[1] (*Duntreath Class of Cases.*)—(Findrassie Case) Leslie v. Leslie, 24th July and 5th Dec. 1752; Elch., voce Tailzie, No. 49; (Randaston) Erskine v. Hay Balfour, 14th Feb. 1758, Mor. 4406; (Duntreath) Edmonstoune v. Edmonstoune, as reversed by House of Lords, temp. Lord Mansfield, 15th April 1771, Mor. 4409; (Gordonstoune) Gordon v. Lindsay Hay, 8th July 1777, Mor. 15462, and App. 1. Tailzie, No. 2; Kinloch v. Rochied, (Inverleith and Darnchester,) as reversed by House of Lords, 22d March 1790, temp. Lord Thurlow, C. (Lords Journals, vol. 38. p. 569, and cited in Baron Hume's Lect.); Gordon v. M'Culloch, 23d Feb. 1791, Mor. 15465; Sir C. Preston v. Wellwood, 23d Feb. 1791, Mor. 15463; same case, 31st May 1797, F. C. & Mor. 15466 (subject to observation per Lord Brougham, in 1 Sh. & M'L. 46); Marchioness of Tichfield v. Cumming, 22d May 1798, Mor. 15467, affirmed 20th June 1800; Miller v. Cathcart, 12th Feb. 1799, Mor. 15471; (Culdares) Menzies v. Menzies, 25th June 1785, F. C., Mor. 15436, 18th Jan. 1803, and affirmed 20th July 1811 per Lord Eldon; (Baldastard) Steel v. Steel, 12th May 1814, F. C., affirmed 24th June 1817, 5 Dow, 78; Murray v. Elibank, 2d July 1833, F. C., affirmed 19th March 1835, 1 Sh. & M'L. 1; (Herbertshire) Morehead v. Morehead, as reversed, 31st March 1835, 1 Sh. & M'L. 29; Brown v. M'Gregor Murray 11th March 1837, F. C., affirmed 12th Feb. 1838, 3 Sh. & M'L. 84.

fiction, to satisfy a technical rule, cannot alter the character imposed upon the donee by the will of the disponer, particularly as the only object in resorting to such a fiction is to give his intention effect. In the present case, as it was clearly the will of the entailer that the second son of Margaret Mitchell should be the first actual taker under the deed, the fiction or supposition of a fiduciary fee, if brought into operation at all, must be so, not to destroy but to effectuate that intention. But the current of authorities[1] clearly establishes that this technical difficulty, if it ever existed, no longer exists in the law.

Lord Braxfield, J. C., in the case of Gerran v. Alexander, 14th June 1781[2], held, 1. that a fee may be in pendente, and that there was no necessitas juris to uphold a contrary presumption; 2. that the intention of the disponer was the paramount principle to be looked to in fixing the character of the disponee; and, 3, that even if the rule that a fee cannot be in pendente remained in force, the principle was met by supposing a fiduciary fee in the parent till the child was born, the institution of the heir then clearly taking effect. Thus the Court had been prepared to find authoritatively, as was done in the leading case of Newlands, 9th July 1794[3], affirmed on appeal tempore Lord Loughborough, C.[4], that the fee was clearly vested in

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[1] (*Question of Institute or Heir.*)—Ersk. b. 2. tit. 1. sec. 4.; Stew. Ans., voce Fiar; Dirl., voce Fiar, Nos. 9. & 10.; Kam. Sel. Dec. 169; Forbes v. Forbes, 3d Aug. 1756, Mor. 14859; Gerran v. Alexander, 14th June 1781, Mor. 4402; Newlands, 9th July 1794, Mor. 4289, affirmed on appeal; Thomson v. Thomson, 1812, 1 Dow, 417; Harvey v. Donald, 26th May 1815, F. C.; Ersk. b. 2. tit. 9. sec. 41.; Craig, lib. 2., dieg. 22., sec. 21.; Bell's (W.) Digest, voce Special Service.

[2] Mor. 4402. [3] Mor. 4289. [4] Mor. 4291.

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Respondents Argument.

the children; and the same was held by Lord Eldon, C., affirming, in 1812, the case of Thomson v. Thomson[1], decided below, of even date with the case of Newlands, but which had stood over; and, finally, the Court, in Harvey v. Donald, 26th May 1815[2], disposed of the difficulty now raised by the appellant as to the children, the disponees, not being born when the succession opened; it being held that the case of Newlands had settled a general rule, applicable alike whether the children were born at the death of the disponer or not. But esto, that it was necessary to suppose a fiduciary fee in the parent till the birth of the child, and so Lord Corehouse probably thought; still the character of institute impressed on the fiar by the will of the disponer remained unchanged.

Besides, a life-rentrix, as fiduciary fiar, was in no respect in the situation of an absolute fiar, institute, or first taker under the deed. She held the property, not for her own absolute use, but for the use of another. No doubt as life-rentrix she was in many respects interim domina of the subject, and saved from casualty of ward and non-entry, and accordingly in the brieve in a special service, the seventh head of inquiry was,—In whose hands the fee has been since the death of the ancestor? This is no farther answered than to prove life-rents where they have existed, as they exclude non-entry while they last. So that the appellant had overlooked important authorities, and had relied on the case of Lord Dundas, which, from the very short report of it, appeared to have been one of those amicable suits now discouraged by the court, where those acting

[1] 1 Dow, 417. [2] Fac. Coll.

for Lord Dundas had thought fit to consult the court upon the accuracy of the title completed in his Lordship's person. The objection started in the name of a substitute heir was, that a general service having been expede by Lord Dundas upon the supposition that the precept had been exhausted by the infeftment of the first Lord Dundas in life-rent merely, that must have been done on the footing of the first lord being a fiduciary fiar; but the court held the title valid,—in other words, considered the general service, by which Lord Dundas took nothing, to be immaterial.

2. As to the effect of John's service as heir; it is well known that a service is not confined to the case of an heir, as distinguished from a disponee or institute. Where a party is about to make up a title it may be equally necessary for him to establish his character of disponee as to establish his character of heir, and equally in the one case as in the other this may be done by service. In the present case, John Maxwell Logan was not named in the deed; it was proper that he should establish his character of second son before making use of the procuratory, and this was aptly done by service. If the procuratory might be used without this ceremony, à fortiori has it been used with it?

Apart from the technical distinction between an institute and an heir, the circumstance that the second son is specified in one provision of the deed, and omitted in the statutory clauses, is, according to the known rule of construction of entails, sufficient to shew that he is not restrained by them.

Besides, the question was as to John's powers under the deed, and therefore the objection of the appellant was not hujus loci, there being no question with a

respect of a service expede as heir of tailzie. The first decision of the Court is reported under date 25th June 1785[1], (the report, however, being confined to one branch of the argument). The cause, having been appealed, was remitted by the House of Lords on 30th June 1801, and the Court having by a judgment on 18th January 1803 adhered to their former interlocutor, the same was affirmed on appeal, 20th July 1811, (not reported) temp. Lord Eldon, C.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, in this case I think your Lordships cannot entertain any doubt of the propriety of the interlocutor which has been pronounced. This was a disposition by a deed of entail to Margaret Mitchell in life-rent, and to her second son, and he now claims the right to sell or dispose of the estate as he may think fit. Now, it is not contended to be doubtful that the institute is not bound by the fetters of this entail, as the fetters only apply to the heirs and not to the institute; and my Lords, it is clear that in this case the respondent John Maxwell Logan was institute. He is designated as such. He is the stock from whom the heirs substitutes are to proceed. It is manifest from the structure of the deed, that in imposing the burdens on Margaret Mitchell and the heirs, the entailer does not impose them upon the institute. For this unquestionably is law, that the clause imposing fetters must be construed strictly, and the Court must find in that clause express terms including the institute, which there are not here.

[1] Fac. Coll., and Mor. 15436.

They both asked the declaration of the Court as to the right of the parties upon the construction of the deed of entail. The Lord Ordinary and the Court unanimously came to the conclusion, that John Logan is not heir of entail, and that he is the institute, and not included within the fetters of the entail. It seems to me, there is no doubt raised as the propriety of that view, and therefore I shall move your Lordships to affirm the judgment. Probably the relationship of the parties would induce the respondent not to ask for costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed.

DEANS and DUNLOP—CALDWELL and SON, Solicitors.

[*5th August* 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 28.) JAMES BEVERIDGE and JOHN WRIGHT WILLIAMSON, Appellants.[1]

[*Lord Advocate* (*Rutherfurd*) — *John Stuart.*]

ALEXANDER SMITH, Respondent.

[*Pemberton* — *James Anderson.*]

Bona fides — *Competition.* — Circumstances in which Held (affirming the judgment of the Court of Session) that an arrangement had been entered into by the general creditors of an insolvent debtor, including a party holding a prior heritable security and parties holding postponed heritable securities, which would make it a breach of good faith in the parties to adopt separate proceedings; and the postponed heritable creditors having, subsequent to said arrangement, poinded the ground, Held, further, in a question with the prior heritable creditor, that such proceedings could not have effect, and that it was immaterial whether a preference at law had been thereby gained, since it could not equitably be used.

1st DIVISION.
Lord Ordinary Cockburn.

IN December 1829 Thomas Thomson, innkeeper in Kinross, granted a bond and disposition in security for 1,800*l.* over certain heritable subjects to Alexander

[1] 16 D., B., & M., 381.

Smith the respondent. In 1830 he granted to Smith another bond over the same subjects for 1,100*l.*; and on both securities Smith was infeft. In 1831 Thomson granted a bond and disposition in security for 300*l.* to the appellant, James Beveridge, and another bond and disposition in security for 1,261*l.* to Skelton and others, who subsequently conveyed it to the other appellant, John W. Williamson, a writer in Kinross.

In the beginning of 1832 Thomson became insolvent, and several personal creditors proceeded to do diligence against him. Thomson called a general meeting of his creditors, which was held at Kinross on 21st March 1832. Among others, the respondent, and Skelton, and Williamson as acting on behalf of Beveridge, attended on this occasion, and concurred in the resolutions adopted at the meeting. The minutes bear, that Thomson laid before the meeting a state of his affairs, and that "the meeting having taken into consideration the "above state of debt, along with the circumstances of "the business carried on by Mr. Thomson, are of "opinion, that in the meantime it is most advisable, "and for the interest of all concerned, that the estab-"lishment should be kept open, under the control of "the creditors; and that, for this purpose, a committee "should be named to superintend the management of "Mr. and Mrs. Thomson, to see all monies regularly "and periodically lodged in the bank in name of said "committee, or of one or more of their number, and to "pay out such sums as are necessary for carrying on "the business." It is then stated, "that the meeting "accordingly resolve to manage the business in the "manner above mentioned, and appoint the following

being used, he was instructed, at a subsequent meeting held on 1st February 1833, "to obtain an assignation "to the mail and coach drawing and profits, as trustee "for the general behoof."

Of the last meeting of the committee, held on 2d December 1833, the minute bears that the respondent was instructed "to wait upon Williamson, and receive "from him for our information all his accounts relative "to Mr. Thomson's matters, that we may thereby be "enabled to judge what farther procedure shall be "necessary to be adopted in the regulation for the "future of Mr. Thomson's matters."

In July 1834 Beveridge and Williamson, having previously raised on each of their heritable bonds a summons of poinding the ground before the sheriff of Kinross, and having obtained decree, and raised and executed letters of poinding, obtained warrants of sale of the moveables on the ground in the natural possession of the debtor. They did not execute these warrants, but in June 1834 they obtained a fresh warrant, and advertised a sale. The respondent obtained an interdict of the sale, and raised a summons of poinding the ground in the Court of Session (Thomson being dead, and his heir abroad). Beveridge and Williamson entered appearance to the action, and were allowed by the Lord Ordinary (Corehouse) to state their defences, in which they maintained that the respondent had lost his right as a prior creditor, while they by their proceedings had gained a preference.

The Lord Ordinary (Cockburn, before whom the case came in place of Lord Corehouse, who had taken his seat in the Inner House,) pronounced the following interlocutor: —"Edinburgh, 2d June 1837. —The Lord

" 1. It is said that they were bound to go along with " the rest of the creditors, and that this was the special " duty of the defender Williamson, who had not only " agreed to abstain from separate measures, but was the " agent of the creditors. But these averments are not " supported by the evidence in process; and the objec- " tion, instead of being stated by or for the general " body of the creditors, is brought forward by the pur- " suer individually, who wishes to exclude the defenders, " merely in order to enable him to use the very separate " measures which he condemns.

" 2. It is stated that the defenders have lost the " benefit of their diligence by mora. The Lord Ordi- " nary does not think so. A long period has certainly " followed their warrants, and no actual sale has hitherto " taken place. But the first part of this delay, extend- " ing to nearly a year, arose from their desire to accom- " modate the creditors, and the pursuer as one of them, " by not turning the widow of the tenant out of pos- " session, and was acquiesced in by them and by him. " During the subsequent part of it, they were prevented " from proceeding by an interdict at the pursuer's " instance, which he afterwards abandoned. Nor did " the pursuer ever do any thing in furtherance of his " own right during these pauses.

" The Lord Ordinary gives the defenders their ex- " penses, because in so far as they are concerned, the " pursuer was wrong. He has got decree quoad any " moveables that may be on the ground after the de- " fenders debt is paid; but this they never resisted, or " had any thing to do with."

The respondent reclaimed.

After advising minutes of debate the Court pro-

There was nothing in the facts or law of the case to raise a plea of personal exception against the appellant Williamson, in his character of assignee of Messrs. Skelton, Steedman, and Dowie, either on the ground of agency or otherwise. Neither the alleged agreement, nor the plea of personal exception, could be urged against or affect the appellant Mr. Beveridge, for he was no party to that alleged agreement, and his interests could in no shape be injured by the plea of personal exception proponed against Williamson. By the law of Scotland it is clear, that by raising their actions of poinding the ground, obtaining decrees therein, executing and reporting poindings of the ground, obtaining and extracting warrants of sale, and advertising a sale to take place, all without the respondent having taken any step to assert his alleged right over the moveables on the ground in virtue of his bonds; the appellants had obtained and secured a preference over these moveables, which the respondent was no longer entitled to defeat. Even if an actual sale should be held to be necessary to complete the appellants preference over the moveables on the ground, the present question must be viewed as if a sale had taken place, such sale having been prevented solely by delay granted at the respondent's request, and by the wrongous interdict obtained by the respondent, and kept in force by him for nearly a year on the dependence of an action which he thereafter abandoned as incompetent.

Appellants Argument.

Respondent.—In the circumstances of this case, the claims of the appellants ought to be rejected as groundless and untenable, and there is no room even for admitting them to the benefit of a pari passu ranking;

Respondent's Argument.

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Respondent's Argument.

the respondent never directly or indirectly renounced his right to a preference, and, at any rate, the proceedings adopted and contemplated by the general body of the creditors had become inoperative, and the rights of the present competitors must be determined, according to the priority of their infeftments, in the same way as if no such proceedings had taken place.

All the measures adopted by the respondent, as the holder of the first heritable securities, were conducted in a legal and formal manner, and there are no grounds either in fact or in law to bar him from asserting his right to a preference, and obtaining a decree of poinding the ground, in terms of the conclusions of the summons.

Independently of these fair and equitable grounds, the appellants in point of law had not established a preference. Even although they had acquired a complete right to the moveables under their diligence, they were barred, personali exceptione, from claiming a preference over the respondent, in respect of their accession to the resolutions adopted at the general meeting of Thomson's creditors, and of the arrangement whereby they became bound to use their poindings of the ground solely for the purpose of defeating the diligence of the nonacceding personal creditors. And in any view, the appellant Mr. Williamson, by acting throughout the whole proceedings as the agent and legal adviser of the respondent and the other creditors, was precluded from claiming any benefit in this competition, and had rendered himself responsible for any loss which might be sustained by his failure to take the necessary steps to protect the respondent's interests.

LORD CHANCELLOR.—My Lords, this case in a court of equity would not have afforded room for discussion; and it is fortunate that the principle adopted by the Court below is the same with that which would have been prescribed in a court of equity.

My Lords, the facts of this case appear to be these: Mr. Smith had the first heritable security. He and the other creditors met in March 1832, and it was arranged that the business should be carried on, and a committee of management was appointed, of whom Mr. Williamson was one. Mr. Williamson acted for Beveridge and other creditors. The former part of the resolution, as set out in the appellants case, states, that as "some of "the creditors executed poindings of the furniture, and "used arrestments, in the hands of Mr. Pyper and "others, the committee are authorized to take measures "to render these steps ineffectual, as preferences, in such "a way as they may deem advisable, either by paying "the expenses of these poindings, or by making "Mr. Thomson bankrupt." The mode they prescribed was not that which was afterwards adopted on another occasion, to which I will presently refer; but the object was necessarily the object of all parties interested in the estate,—to prevent possession of the estate being obtained by diligence being pursued by a particular creditor: that took place on the 21st of March. On the 4th of April the committee of management had another meeting, in which this appears as their minute:—"In consequence of some of the creditors "having poinded some of the horses, the sale of which "is advertised for to-morrow, the committee consider "that if the sale is persisted in it will be necessary to "purchase back the horses, and take measures for

to pay himself. He was willing that the property should be taken care of, for the purpose of providing such means as could be found to pay as many creditors as possible. He abstained therefore from using that diligence which it was open to him to use. But can it be supposed that it was his intention not to protect himself against the chance of the second heritable creditor gaining priority over himself? That is quite inconsistent with the whole arrangement between the parties, and quite irreconcilable with any intention that the first heritable creditor could have. Now, that some proceedings were necessary seems universally admitted. They were necessary for the purpose of carrying into effect that resolution of all the creditors, as expressed in the minute of the 21st of March 1832, for preserving the property for the benefit of all who were interested in it. Accordingly, proceedings were instituted for obvious reasons in the name of Smith. It was quite immaterial which heritable creditor was made a party, if the intention was to preserve the relative situation of all the creditors, but by no means immaterial if the object was to gain priority on the part of one over the other. But the object being to prevent the personal creditors gaining an advantage over all the others, it was immaterial which heritable creditor was made a party to prosecute the proceedings. Accordingly, by the direction of Mr. Williamson, proceedings were instituted in the name of Beveridge and others, having such heritable securities. Under these circumstances the proceedings continued until April 1836, when it is quite clear, for the reasons which have been stated at the bar, that at that time Mr. Williamson was agent for Smith; and if the question turned on that, no doubt it would be to be considered how far priority had

Those are the grounds upon which the Court below have proceeded. My opinion on this subject is, independently of the act of agency by Williamson on behalf of Smith, founded on that arrangement to which all the creditors were parties on the 21st of March 1832, explained by the subsequent proceedings of the 4th of April 1832,—that after that arrangement it was a breach of faith in the parties to adopt those proceedings, and that it is the duty of every court exercising an equitable jurisdiction to confine the parties to that situation to which they ought to have confined themselves, if they had acted with good faith towards each other and consistently with the arrangement they had made.

My Lords, that is the foundation of the interlocutor appealed from; and if it had not been for the difference of opinion among the Learned Judges in the Court below, it appears to me to be a case so entirely established by the resolutions of the creditors in March 1832, regard being had to the subsequent proceedings, that perhaps some of your Lordships time might have been saved, after hearing the appellants; but, under these circumstances, it is more satisfactory that you should have heard the whole case. I need hardly say, that being of that opinion, I should recommend your Lordships to affirm the interlocutor of the Court below, with costs, because it is a case in which an attempt was made, in breach of good faith, according to the opinion I have formed, to gain an advantage, which attempt, in my opinion, ought not to have been made.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House,

[*5th August* 1839.]

(Appeal from the Court of Session, Scotland.)

CHARLES TENNANT and Company, Appellants.[1] (No. 29.)

[*Attorney General (Campbell)—Lord Advocate (Rutherfurd).*]

JAMES HAMILTON (Pauper), Respondent.

[*A. M'Neill — James Anderson.*]

Bill of Exceptions — Proof — Witness. — In an action of nuisance one of the defenders witnesses, when cross-examined by the pursuer, answered, "Knows Glas-"gowfield (a neighbouring property); never knew of any "damage done there." The counsel for the pursuer then proposed to ask the witness, "Whether he had known of "any sum having been paid by the defenders to the pro-"prietors of Glasgowfield, for alleged damage?" The judge, at trial, refused to allow the question to be put, whereupon the pursuer excepted. There was a verdict for the defenders: Held (reversing the judgment of the Court of Session, which allowed the exception,) that the proposed inquiry, being irrelevant to the subject matter, was inadmissible as evidence.

Per L. C.—It is an acknowledged rule of evidence that a collateral irrelevant inquiry cannot be gone into, to discredit a witness on the other side.

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[1] 1 D., B., & M., new series, p. 502; Fac. Coll., 14th Feb. 1839.

" 3. Or whether, in the said year 1819, previous to " the pursuer's entering into possession of the said gar- " den, the smoke or other vapours issuing from the said " works of the defenders were as great or nearly as " great in quantity, and as noisome, offensive, noxious, " or unwholesome, or nearly so, in reference to the said " garden of the pursuer, as those issuing from the said " works of the defenders during the said period, from " 1819 to Martinmas 1832?"

Upon the trial before Lord Jeffrey and a common jury at Glasgow the pursuer adduced evidence to establish that the smoke and other vapours from the works of the defenders had, in point of fact, occasioned damage and injury to the produce of other grounds in the neighbourhood of the said works; and the defenders adduced evidence to establish that the said works did not, in point of fact, occasion any damage or injury to the produce of any other grounds in the neighbourhood. Among other witnesses for the defenders was a person named David Smith, a land-surveyor in Glasgow, who stated that he had surveyed the lands in the neighbourhood, that he had made a plan of the vicinage, and mentioned several places which, in his opinion, had sustained no damage.

On cross-examination, by the pursuer, the witness made the following answer: — " Knows Glasgowfield" (a place not previously mentioned). " Never knew of " any damage done there." The counsel for the pursuer then proposed to ask the witness whether he had known of any sum having been paid by the defenders to the proprietors of Glasgowfield, for alleged damage then occasioned by their works? This question was

jected a proffered sum, and brought their action for nuisance, they would not have been allowed in that action to give the offer in evidence, nor to put the question as here proposed. It is clear then that the answer to this interrogatory cannot be made evidence for the respondent.

But then it is said that the proposed question was in any view competent as a means of testing the credibility of the witness. In the first place, that was not the object for which the evidence was tendered; this view of the matter was not suggested at the trial, nor there disposed of, nor is it adverted to in the bill of exceptions. Secondly, If the question had been put to test the credibility of the witness, the judge should necessarily have been informed of it. But, thirdly, It could not be put to test the credibility of the witness, because it would clearly produce an answer involving matter irrelevant to the issue. The rule on this subject is well laid down in the last edition of Phillipps on Evidence, by Mr. Amos.[1] By the law of England you may discredit a witness by examining him as to statements which he made upon other occasions, in order to discredit and contradict him, but then he can only be asked as to statements which are relevant in themselves. See Baron Parke in Crowley v. Page.[2] In trial by jury the attention of the court and the jury ought to be kept to the issue; it is incompetent to travel into other matter. A party may prove his whole case from his adversary's witnesses by cross-examination; but it is not to be done by irrelevant cross questions.

[1] Edition 1838, p. 909.

[2] 7 C. & P. 791.

of money under a verdict of a jury, or decree of a court, or of an arbiter, have been admissible as evidence? Non constat that it was done by compromise. [*Lord Chancellor.*—How does the question of compromise arise under this first issue?] It arises in this manner: the assumption that the respondent is attempting to make evidence of a payment made in order to compromise a disputed claim, pervades the whole of the appellants argument; this is an entire mistake. It will be time enough to consider whether a compromise of a claim of damages with the proprietors of Glasgowfield can affect the merits of the present cause, when any such compromise is established. The respondent has inquired merely into the witness's knowledge of the fact of the payment, and no point is raised as to whether a compromise between the defenders and a third party may be given in evidence in the present cause. The appellants say no party complained of the nuisance: the respondent says there were complaints, and that sums were paid; to which it is replied that these may have been paid under compromise. But the question was not, Do you know that there was a compromise? but, Do you know that money was paid for alleged damage? [*Lord Chancellor.*—How do you make out it was not to buy peace?] Assuming that the fact of payment of money was collateral to the fact of damage having been done, was there any thing to prevent the respondent from cross-examining the witness in relation to it? What is foreign to the issue must not be confounded with what is collateral to the issue; foreign matter may be equally inadmissible, whether it is sought to be proved as a substantive fact, or as testing the

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Respondent's Argument.

the inquiry. This principle applies to the most incompetent species of evidence—a party's own statements. Where a pursuer asks a witness what a defender said, the defender may, in cross-examination, inquire as to further statements, so as to try the accuracy or the general character of the memory of the witness.[1] The actual damage done might be proved by the cross-examination of this witness; besides, the respondent was entitled to damage the credit due to the witness. The question ought to be fairly looked to, not critically scanned; the word "then," which occurs in the question, meaning the fact of payment for damage "then" done; that is to say, at that time, or before the money was paid.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, in this case there was a jury trial in Scotland, and a bill of exceptions tendered upon the examination of a witness named David Smith. The object of the action was to try a question of nuisance to a garden in the neighbourhood of a manufactory, which, it was said, emitted vapour and smoke prejudicial to the property of the pursuer, the party complaining. David Smith was called for the defenders, and he was examined as to certain premises in the neighbourhood of the manufactory in question, but he was not examined by the party producing him with respect to the place called Glasgow-field,—not the place in question, but a place situated near the manufactory. Both parties went into evidence for the purpose of showing what the effect of this

[1] Chapman, 17th March 1821, 2 Murray, 460.

posed to ask the witness "Whether he had known of "any sum having been paid by the defenders to the "proprietors of Glasgowfield (the situation of which "is pointed out on his plan), for alleged damage then "occasioned by their works?"

Now, he had already said that he knew of no damage done there. If that question had been asked him by the defenders, no doubt a great latitude in cross-examination might have been permitted to the pursuer, for the purpose as well of ascertaining what he meant by "did not "know," as for the purpose of testing the accuracy of his statement—of the credit due to that statement; but it so happens, when he says he knows Glasgowfield, and never knew any damage done there, it is an answer given by him to a question of the pursuer in cross-examining him. The pursuer is entering into a line of examination for the first time, and having got an answer which did not suit his purpose, he endeavours to get rid of the effect of that answer by putting a question upon a point short of what was the witness's knowledge; viz. "Whether he had known of any sum having been "paid by the defenders to the proprietors of Glasgow-"field, the situation of which is pointed out on his plan, "for alleged damage?" The pursuer meant, if he could get an answer favourable to his view, to make that part of his case; he meant, not being able to get the witness to say that he knew of any damage, to get him to say that which he conceived would be the next best evidence, but which, in fact, would be no evidence at all. If the witness had answered in the affirmative that he had known of money being paid for alleged damage, it would be no evidence, because money paid upon a complaint made, — money paid merely to purchase

be supported upon that ground, nor was that the ground, as I understood the argument, upon which it was attempted to be supported, but that it might be put as a matter of inquiry, with a view to test his credit. But if it be not evidence, it is an inquiry perfectly collateral; it is an inquiry into a matter which was not relevant to the subject matter in dispute: it would be relevant if it were admissible in evidence, but it is not. It does not relate to the subject matter, and it is an acknowledged law of evidence that you cannot go into a collateral irrelevant inquiry for the purpose of raising a collateral issue to discredit a witness produced on the other side.

On these grounds the Learned Judge trying the cause was of opinion that the question was not an admissible question under the circumstances of this examination, and to that ruling of the Learned Judge, unfortunately for all parties, because leading to great and unnecessary expense, a bill of exceptions was tendered. It was a question which, answered in either way, could not have affected the result of that cause in the slightest degree. The witness, whether his evidence was correct or not, had spoken of other descriptions of property in the neighbourhood of this manufactory, and he is asked whether he knew of money paid for alleged damage to a particular field, as to which he is not examined in chief; whether he answered yes or no, it cannot affect the question; now the Learned Judge so thought; unfortunately, however, a bill of exceptions was tendered, and unfortunately the Court of Session were of opinion against the ruling of the Learned Judge; they were of opinion that this question might be put, and

reserved only for cases of great importance, where the real question between the parties is conceived to turn upon it, and where it requires the adjudication of the Court to set them right upon some doubtful point; it is a matter to be regretted that the rule which prevails so beneficially in this country, of reserving that course of proceeding only for cases that really deserve it, is not followed in Scotland, inasmuch as this case is an example of the evil which must flow from the too liberal use of that right by the suitor of tendering a bill of exceptions, and calling in question the ruling of a court of justice. My Lords, this is an instance in which I cannot but think it would have been better for the parties to have taken the course of bringing before the Court the merits of the case as to the propriety of the finding by a motion for a new trial, instead of bringing it by the course of error upon a bill of exceptions.

My Lords, I have no doubt, however, that this was a question which, under the circumstances, it was not competent for the party to put, and that the Learned Judge who tried the cause came to a right conclusion upon the evidence, and the bill of exceptions upon that point ought to be disallowed. Under these circumstances I move your Lordships to reverse the interlocutor appealed from, which decided that the Learned Judge who tried the issue had not properly ruled, and that the bill of exceptions ought to be disallowed.

The House of Lords ordered and adjudged, That the interlocutor complained of in the said appeal be and is hereby reversed: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, with

[*5th August* 1839.]

(Appeal from the Court of Chancery, England.)

SAMUEL BIGNOLD and another, Appellants. (No. 30.)

[*Knight Bruce—Jacob—Girdlestone.*]

THOMAS OSBORNE SPRINGFIELD and others, Respondents.

[*Attorney General (Campbell)—Pemberton—Blunt.*]

Statute 5 & 6 *W.* 4. *c.* 76. *s.* 71. (*Construction of*)—*Charity.*—Held, on consulting the judges, and affirming an order in Chancery, that the import of the above section of the above statute is, that the estate, title, and interest of bodies corporate, &c. of boroughs, in charitable estates, held by them in trust, should absolutely cease and determine on 1st August 1836, notwithstanding its being thereby provided that said estate, title, and interest should continue "until the 1st day of August 1836, or until "parliament shall otherwise order."

COURT OF CHANCERY, ENGLAND.

Ld. Cottenham, Chancellor.

THE 71st section of the act of parliament of the fifth and sixth of King William the Fourth is as follows: "And whereas divers bodies corporate now stand seised "or possessed of sundry hereditaments and personal "estate in trust, in whole or in part, for certain cha- "ritable trusts, and it is expedient that the adminis- "tration thereof be kept distinct from that of the public "stock and borough fund; be it enacted, that in every "borough in which the body corporate, or any one or "more of the members of such body corporate, in his or

" Chancellor or Lords Commissioners of the Great Seal " shall make such orders as he or they shall see fit for " the administration (subject to such charitable uses or " trusts as aforesaid) of such trust estates."

On the 16th of August 1836 the appellants presented a petition to the Lord Chancellor by their description of two of the inhabitants of the city of Norwich, and also two of the persons who at the time of the passing of the said act of parliament were members of the body corporate called the mayor, sheriffs, citizens, and commonalty of the city of Norwich, on behalf of themselves, and all other the persons who at the time of the passing of the said act were members of and constituted such body corporate; which petition prayed that it might be declared that, according to the true construction of the said act of parliament, all the said charity estates, funds, and properties did then remain and continue vested in the said petitioners and the other of the surviving persons therein named, or in such of them as were or might be living at the time of making the order to be thereupon made, upon the uses and trusts and for the purposes to which, at the time of the passing of the said act of the 5 & 6 Will. IV., the same were applicable as aforesaid; and that they the said petitioners and the said other persons might be at liberty and might be authorized to administer and apply the same, and the rents, interests, dividends, and annual profits thereof, upon and for such uses, trusts, and purposes, in like manner as the same had been theretofore applied; or in case it should appear to the Court that such is not the true construction of the said act, then that they the said petitioners and such other persons as aforesaid might be appointed trustees for the aforesaid

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purposes, or otherwise that it might be referred to the master of the vacation to appoint proper persons to be such trustees, with liberty for them the said petitioners and the said other persons to propose themselves as such trustees, and that in the meantime the said petitioners and the said other persons might be at liberty to act in the administration of the said estates and funds, rents and income thereof, and that all proper directions might be given for effectuating the aforesaid purposes, and for duly administering the said estates and premises, and that the costs of and incident to the said application might be paid out of the said trust estates; or that his Lordship would make such further or other order as to his Lordship should seem meet.

On the 19th of August 1836 the respondents (who were respectively members of the council of the present body corporate of the mayor, aldermen, and burgesses of the borough and city of Norwich,) presented another petition to the Lord Chancellor, stating that, in consequence of the lapse of the said 1st day of August, and parliament not having given any order or direction in respect to said estates, there were no longer any trustees to administer the charity, and therefore praying simply that it might be referred to one of the masters of the said Court to approve of some proper persons to be appointed trustees of the said charities; or that his Lordship would make such other order for the administration of such trust estates as to his Lordship might seem just and fit.

Order of Court, 20th Aug. 1836.

On 20th August 1836, the Lord Chancellor made an order to the effect following; viz., That it be referred to the master of this Court in attendance during the vacation to appoint proper persons to be trustees of and for

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the charity estates and property late vested in or under the administration of the corporation of Norwich, or any of the members thereof, in that character, which are affected by the said section of the said act. And it is ordered, that all deeds, books, papers, and writings in the custody or power of any of the parties, relating to the said charity estates and property, be produced before the said master upon oath, as he shall direct, and he is to be at liberty to state any special circumstances, as he shall think fit. And his Lordship doth reserve the consideration of all further directions, and of the costs of these applications. And any of the parties are to be at liberty to apply to this Court, as there shall be occasion.

Messrs. Bignold and Rackham appealed.

Upon hearing counsel for the parties respectively, on the 19th February 1839, the cause was postponed, in order to have the opinion of the Judges upon the import of the foresaid section. On the 25th June Lord Chief Justice Tindal delivered the same, as follows: —

Opinion of Judges, 25th June 1839.

Lord Chief Justice Tindal.—My Lords, in answer to the question proposed by your Lordships to Her Majesty's Judges, viz., Whether the administration of the charity estates and funds, comprised in and described by the 71st section of the 5 & 6 W. 4., c. 76., continued after the 1st of August 1836 in the persons described in the said 71st section, no subsequent act having been passed respecting the same before the 1st August 1836, and no vacancy having been occasioned among such persons before that time? I have the honour of stating our opinion to be, that the administration of the charity estates and funds referred to in the question did not

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shall make such orders as he shall see fit for the administration of such trust estates; and we cannot understand the legislature to have had in its view an alteration by parliament unlimited in point of time in the former part, but limited in point of time to the 1st of August in the latter part of the same section.

The construction contended for on the part of the appellants is further liable to this objection,—that it leaves the time at which the powers of the former trustees are to cease and determine altogether undefined and uncertain. There might happen, according to that construction, an interval of time of unlimited extent before parliament might think fit "to interfere and otherwise "order," and in the meantime it is obvious all would be involved in doubt and uncertainty. And again, there is, as it appears to us, a very strong objection against the reading "and" instead of "or," as contended for on the part of the appellants; that is, again reading the act, "until the 1st of August 1836, and until parlia- "ment shall otherwise order;" for this would imply that parliament could have no power to make such an order until after the 1st of August had passed, a construction not only inconsistent with the general authority of parliament, but irreconcileable with the proviso above referred to, which expressly refers to an alteration to be made before the 1st of August.

Upon the whole, we think the administration of the charity estates and funds did not continue in the persons described in the 71st section after the 1st of August 1836.

Ld. Chancellor's Speech, 25th June 1839.

LORD CHANCELLOR.—This is a case, in which your Lordships have heard the opinion of the Learned Judges. It is an appeal from an order made in Chancery; and

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Ld. Chancellor's Speech.

LORD CHANCELLOR.—I was not in the least aware that upon this point there would be any difference of opinion, otherwise I should have proposed that the farther consideration of the case be postponed, inasmuch as it is in the absence of a noble and learned Lord who had been present during the whole of the argument, and with whom I communicated on this subject before he left the House. But as the noble and learned Lord who has just addressed your Lordships differs in his view of the case, I would suggest that the consideration of the case be postponed.

Mr. Attorney General.—May I be allowed to say, that on behalf of the respondents I am instructed to pray that the costs be allowed? We submit that it would be hard that the costs should fall upon the charity.

The cause stood adjourned till the 5th of August.

Ld. Chancellor's Speech, 5th Aug. 1839.

LORD CHANCELLOR.—In this case, which was heard some time since, your Lordships had the assistance of the Learned Judges, whose opinion was unanimous, that the order appealed from was the correct order. My Lords, when the Learned Judges gave that opinion I moved your Lordships to affirm the judgment. One question remains as to costs. My Lords, the order appealed from is an order made in the Court of Chancery. The Learned Judges have delivered their opinion unanimously that the judgment below is correct, and it is matter of course, unless there is some reason to the contrary, that costs should follow the affirmance of the judgment, and particularly in this case where the respondents are trustees of a charity.

[16*th August* 1839.]

(Appeal from the Court of Session, Scotland.)

WILLIAM LECKIE EWING and others, Appellants.[1] (No. 31.)

[*Knight Bruce—H. Robertson.*]

GLASGOW COMMISSIONERS OF POLICE, Respondents.

[*Pemberton—A. M'Neill.*]

Title to pursue — Statute 1821 (*Glasgow Police*). — Held (affirming the judgment of the Court of Session) that residenters in Glasgow, rateable in police taxes, had no title as such, at common law, nor under the above police act, to sue the police commissioners, on behalf of themselves and others, for misapplication of the police funds.

2D DIVISION.

Ld. Cockburn, Ordinary.

THE appellants reside or occupy property in Glasgow, in respect of which they are liable to the police assessments.

An act of parliament which was passed in the year 1821, for establishing a police for the city of Glasgow, among other things provides for the election of general commissioners, to whom is committed the power of carrying the purposes of the act into execution. The act also specifies very particularly the purposes for

[1] 15 D., B., & M., 389; Fac. Coll. 19th Jan. 1837.

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which the general commissioners are authorized to levy assessments upon the inhabitants liable to pay them, as also the way in which the amount of the necessary assessments is to be ascertained. By the 124th section appeal to the Circuit Criminal Court is allowed, and by the 133d section it is declared, that "no "action shall be commenced against the magistrates "and other commissioners for any thing done in the "execution of this act after three calendar months "from the time the act is committed," it being "com- "petent to the trades house and merchants house to "bring actions against the board of commissioners, or "the board against its predecessors in office, in the "Court of Session or Exchequer, for misapplying "the funds, within twelve calendar months after the "offence."

There are two companies for supplying the city of Glasgow with water, established under separate acts of parliament, the one under the name of the Glasgow Waterworks Company, and the other under the name of the Cranstonhill Waterworks Company. A proposal having been made to unite the two companies, by an arrangement under which the Glasgow company should, under authority of an act of parliament to be obtained, purchase up the Cranstonhill company's property and works, a bill was introduced into parliament (session 1834), to obtain an act authorizing this agreement to be carried into effect. This bill was strongly opposed by various public bodies, and among others by the general commissioners of police, who sent up a deputation to London to oppose the bill. A resolution was passed at a meeting of the board on the 13th February 1834, by a majority of twenty-one

to four, "That the committee be authorized to co-operate "with the public bodies in giving effect to the resolu- "tions of the board, by opposing the proposed monopoly "in the supply of water, and to constitute a propor- "tional expense of the opposition." The bill having been successfully opposed in parliament, and the expense incurred by the deputation having been ascertained, the board of police, by two resolutions, dated the 17th and 24th July 1834, ordered payment from the police funds of two sums of money, that is, of 47*l.* 7*s.* and 600*l.*, towards their share of the expenses.

The appellants brought a process of suspension and interdict, and afterwards raised an action of reduction and repetition against the respondents, (both bearing to be at the instance of certain private individuals,) setting forth, as their title, that they were "residenters in "Glasgow, or occupiers of property there, and rated in "the police books as liable in the payment of police as- "sessments under the police act, and who have hitherto "been assessed accordingly," and concluding for reduction of the two resolutions of the 17th and 24th of July 1834, as in contravention of the police statute, and to have the commissioners who attended the meetings held on those days respectively ordained, "as "individuals, conjunctly and severally, to repeat and "pay back, or to procure to be repeated and paid back, "into the hands of the said police estaolishment, the "respective sums of 47*l.* 7*s.* and 600*l.*, which they "illegally and wrongfully authorized, sanctioned, and "ordered to be paid away out of the said funds as be- "fore mentioned, for the purpose of defraying the "expense in part of opposing the said water company "bill, to the effect that the said funds belonging to the

The respondents presented a reclaiming note to the Second Division of the Court, and their Lordships, upon

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" the ordinary jurisdiction of the Court of Session to protect against " excess of power is not taken away. The two sections which precede, " and which follow this one, make it clear that the 124th only applies to " proceedings in which the person aggrieved was judicially a party.

" Section 133 limits actions for things done ' in execution of this act,' " to three months, but this does not apply to cases where the complaint is " that the defenders went out of the act; and besides, the act specially " challenged took place on the 17th and on the 24th of July, and the " action was raised on the 13th October. There were resolutions, no " doubt, of February before, to do these acts, which prospective resolu- " tions are not brought under reduction; but it was unnecessary for the " pursuers to challenge, not merely the act which injured them, but all " the votes by which it may have been preceded; if it were, every act " might be saved from objection, by being preceded by a resolution above " three months before, which, in itself, may do no harm, and of which " the party hurt may never hear. In this very case it does not appear how " there was any personal interest in any body to interfere, for nothing " actually touching any individual was done; there was merely a barren, " general, and revocable resolution, that at some future time an unnamed " proportion of the expense would be paid.

" On the merits the Lord Ordinary has abstained from deciding any " thing at present, except the first conclusion of the reduction, because " the other matters cannot very well be extricated till the general " principle be fixed; and if his view of this principle be wrong, it is " needless to compel the parties to go minutely into the rest of the " case.

" He is not moved in deciding the reductive conclusion by any con- " siderations of expediency; he goes upon the statute alone, and his " general opinion is, that the defenders, as police commissioners, have no " particle of power, except what they can show that they possess in " virtue of the act of parliament which creates them, and that he cannot " discover, by any legal reading or construction of that act, that they are " authorized to assess for the purpose of opposing or of advancing any " parliamentary bill whatever.

" The case of the defenders rests on the averments, that the bill in " question was hurtful to the inhabitants, and interfered with the ex- " isting police act, and that, without their official co-operation, it could " not have been defeated. It is, and always must be, one of the mis- " fortunes of permitting such applications of the funds, that any court, in " judging of their propriety, must consider the truth of such averments, " and that these are scarcely capable of being judicially ascertained. It " appears, from this process, that there are persons in Glasgow who hold " that the bill was of a beneficial tendency for the people,—that any " obnoxious clauses might have been given up or arranged,—that it

" Recall the interlocutor complained of; sustain the " objections to the title of the pursuers, as laid in this " action; repel the reasons of suspension and reduc- " tion; dismiss both actions, and decern; find ex- " penses of process due; allow an account thereof to " be given in, and remit the same to the auditor, " when lodged, to tax and report."

EWING and others v. GLASGOW COMMISSIONERS OF POLICE.

16th Aug. 1839.

Judgment of Court, dated 19th (signed 20th) Jan. 1837.

The suspenders and pursuers appealed.

" be conjectured from the fact, that no such clause can be produced " in any statute; even when parliament means to permit the individual " bill which it passes to be assessed for, this is always specially enacted, as " it was in this very Glasgow act.

" It is not necessary to notice the defenders plea under the second " section, except for the purpose of showing the length to which their " argument leads, and the applications of which it admits in other cases. " These sections declare it to be the duty of the commissioners ' to have " ' a general superintendence of their respective districts,' ' and take all " ' measures for preserving the general peace, order, and comfort of the " ' inhabitants thereof;' from which it is inferred, that wherever comfort " is concerned, which it was here, as water and pavement were concerned, " assessments may be imposed. For the same reason, churches, and " prisons, and hospitals, and theatres, and public baths, and other such " things, all most essential, not only to comfort, but to order and peace, " may be erected.

" This is an individual case, but the similarity of all police bills makes " it one which may be acted upon almost wherever these statutes exist; " and if once the power be recognized, as conferred by implication, it is " not difficult to see what use may be made of it. The general burgh " police act may be supposed to contain the essence of all the power which " parliament thought it necessary for police commissioners to have; it " contains no clause empowering them to assess for bills. But, if such a " power be implied in their mere position, then it may be exercised in " every burgh in Scotland. Something may be said in favour of the " system of establishing boards all over the country, to exercise, at the " expense of the public, a discretionary power of promoting, or of thwart- " ing local parliamentary projects; but something may surely be said " against it. The defence that they only interfere to resist schemes " touching their existing powers, affords no protection to the lieges, " for there is scarcely any local bill which may not be truly said to " do so."

open to the inspection of every rate-payer without fee or reward; and it is provided generally that the whole books of the commissioners of police, containing all their minutes of procedure, are to be accessible to every rate-payer who may wish to peruse and inspect the same without fee or reward. For what purpose were these anxious provisions made for the information and satisfaction of the rate-payers, unless it was to enable them to judge whether the commissioners of police had properly performed their duties as prescribed by the statute, whether they had not exceeded their powers in levying assessments, or whether they had not improperly employed the assessments levied? If in any of these respects the board of commissioners transgress the statute upon which their powers depend, it is clear that the rate-payers have a good title, as well as a good interest, to object to such illegal proceedings.

In fact, the rate-payers are the only parties who have a title to challenge irregularities or excess of power in the imposing of the assessments; for it will be remarked, that the power of bringing actions against the board of commissioners, conferred by section 133, upon the three public bodies, before the Courts of Exchequer or Session in Scotland, does not relate to the levying of the assessments, but merely to the "embez-"zling, squandering, or misapplying the funds vested "in them by this act."

Under the 133d section of the act there is a general limitation of all actions to be raised against the board of police, as to any thing done in the execution of the act, to three calendar months from the time the act was committed. This is the general rule. But then there is an exception from that general rule introduced in

" not take away any title belonging by law to indi-
" viduals."[1]

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Respondents Argument.

Respondents.—The present is an action of reduction and repetition, which does not set forth any direct private and patrimonial interest in these appellants, or conclude for any thing to be paid to themselves, nor is it an action in the name of each, setting forth that some portion of the grievance complained of has fallen upon him, and seeking redress to that extent. There is no conclusion for reduction or repetition generally, or to any particular extent or amount, in favour of the appellants, either individually or collectively. It only points at some remote benefit or relief from a burden already imposed, to be derived from a successful issue of the action. It is a sufficient objection to the title to pursue in such an action as this, that by the law and practice of Scotland parties are not entitled to sue, where there is not a personal, distinct, and direct patrimonial interest to maintain the action. A remote, contingent, or possible interest, and far less any such imaginary interest as is here set out, will not sustain an action.

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[1] Johnston v. the Stentmasters of Kelso, 25th June 1800, Fac. Coll. No. 187, Mor. 12426, Ap. 1, Title to pursue, No. 1; Cowan v. Wigton, Magistrates of, 23d June 1782, Fac. Coll. 9, 73, No. 46, Mor. 16133; Anderson v. Magistrates of Renfrew, 30th June 1752, Fac. Coll. 1, 35, No. 17, Mor. 2539; Lang v. the Magistrates of Selkirk, 2d Dec. 1747, Elchies, Burgh Royal, No. 27, and 28th Nov. 1748, Mor. 2515; Dean v. the Magistrates of Irvine, 3d July 1752, Mor. 2523; Gilchrist v. the Magistrates of Kinghorn, 5th March 1771, Mor. 7366; the Merchant Company of Edinburgh v. the Governors of Heriot's Hospital, 9th August 1765, Mor. 5750; Finlay v. Newbigging, 15th Jan. 1793, Fac. Coll. 11, 21, No. 10, Mor. 2008; Wilson v. Scott, 16th June 1793, Mor. 2010; Montgomery v. Macausland, ibid.; Aitchison v. Magistrates of Dunbar, 4th Feb. 1836, 14 D., B., & M., 421.

>RD CHANCELLOR.—My Lords, the judgment of Court below in this case was founded on a defect in tle of the pursuers, and did not profess to decide erits; the decision of the case on appeal, there- must depend on the same consideration. The ocutor appealed from recalling the interlocutor of ord Ordinary, sustained the objections to the title e pursuers as laid in the actions, and dismissed the ns. Those actions were, first, of suspension and dict, and, secondly, of reduction and repetition; both the pursuers described themselves as resi- ers in Glasgow, and occupiers of property there, rated in the police books as liable in payment of ce assessments under the police act, and as having assessed accordingly; and in both they professed ue for themselves and for all those who had adhered hem, and whose names and designations were to specified in a minute in the proceedings. The plaint is against the commissioners appointed under police act for the city of Glasgow, for having ied sums of money, raised under the powers of act, for purposes alleged not to be authorized that act; — that is, in contributing towards the nses of an opposition in parliament to a bill respect- the water companies to supply that city with water. letters of suspension and interdict prayed that defenders, the commissioners, might be interdicted applying any of the monies raised or to be raised er the powers of the police act to those purposes, from levying any sums in whole or in part for purposes; and the summons of reduction and tition concluded that the resolution and act of the missioners for those purposes might be rescinded

to; but he contended that every burgess had an interest to investigate the ground of taxation and amount leviable against himself. The Court, as is said, considered the pursuer's title sufficient; but there was less room to investigate this minutely, as the defenders were thought clearly right on the merits. This, then it must be observed, was not a decision upon the point of title, besides the object of the suit was very different from that now under consideration; the case, therefore, may be altogether rejected.

The next case relied upon by the appellants is Finlay and others v. Newbigging and others, 15th Jan. 1793[1] (ante, p. 857). In that case Finlay, a member of a corporation, disputed the application of a sum of money raised upon the members of it, and having refused to continue the annual payment enforced upon him, the corporation resolved to set him aside from the trade, and that he should not be called to any meeting whilst he continued in arrear; whereupon he, and others in the same situation, brought a process of declarator against the deacon and the members of the corporation. In this case the propriety of the application of the funds was discussed, and so far might have been applicable to a discussion upon the merits of the present case; but as to the actual question of the pursuer's title it seems likewise to have no application. The pursuers complained of a personal injury in their exclusion from the corporation; the form of action and its objects were totally distinct from that now under consideration.

The next case is that of Wilson v. Scott[2] (ante, p. 857).

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[1] Finlay and others v. Newbigging and others, 15th January 1793.

[2] Wilson v. Scott, 16th June 1793.

Edinburgh v. the Governors of Heriot's Hospital[1] (ante, p. 857,) is more applicable; in that case the defenders, being trustees of a charity for poor fatherless boys of burgesses and freemen of Edinburgh, — the pursuers being the merchant company and incorporations of the city, — a process was brought against the governors, concluding to have it found that the governors had no power to feu the charity lands, or, if they had, that the next feuar might be put under certain restrictions. Objections were made to the title of the pursuers, the Lords sustained the pursuers title to carry on the process; but they being of opinion in favour of the defenders upon the merits, no opportunity was offered of questioning this decision upon the point of title; this case was as early as 1765.

In Aitchison v. the Magistrates and Town Council of Dunbar[2], (ante, p. 857,) the majority of the town council, describing themselves as burgesses and town councillors, instituted a suit in the Court of Session concluding for reduction of an act of the town council, in which the pursuers were the minority. It was objected, that as burgesses they could not sue, having no private or patrimonial interest in the subject; for the pursuers it was not disputed that the rule of law was against their title to sue as burgesses, but it was contended that, as members of the town council, they were entitled to demand the judgment of the Court of Session, as to the legality of the act of that body. Upon that distinction the Court sustained the pursuers title, the Lord Justice Clerk

[1] Merchants Company of Edinburgh v. Governors of Heriot's Hospital, 9th August 1765.

[2] Aitchison v. Magistrates of Dunbar, 4th February 1836.

"Court never sustains an action at the instance of a "party who cannot state a direct or immediate interest "in the result, which plainly cannot be alleged in this "case, where the pursuers ask for no judgment avail- "able to themselves, but complain of acts done to the "prejudice of the burgh."

This decision was recognized and approved in the case of the Trinity House of Leith and others against the Magistrates of Edinburgh[1], 6th February 1829, (ante, p. 858,) in which the pursuers, on the ground that they were interested in the completion of the work, instituted proceedings against the parliamentary commissioners for improving the harbour of Leith. It was held that they had no title to pursue, the Lord Justice Clerk saying[2], "If we act as in the case of Inverury I "can find no ground for doubt. The principle is there "laid down clearly and distinctly that indirect interest "of this description will not be tolerated by this Court."

In the case of Lauder[3], in 1821, (ante, p. 858,) the question was raised in an action of declarator as to the right of the burgesses in certain property. The pursuers were burgesses; the claim was not only for themselves but for other burgesses; and it was held that although each burgess might sue for his own individual interest, yet as the action at the instance of the burgesses was raised by them as a body, it must be dismissed, as they were not a corporation, and the action was the more irregular as it concluded for decree of declarator in favour of all the burgesses, while they were

[1] Trinity House of Leith v. Magistrates of Edinburgh, 6th February 1829.

[2] Rep. in F. C., 19th January 1837, p. 336.

[3] Burgesses of Lauder v. Magistrates, 17th May 1821.

done in execution of the act after three months, and it is made competent to the town council, the merchants and trades houses of the city, to bring actions against the commissioners before the Court of Session or the Court of Exchequer, for misapplying the funds, at any time within twelve months. I quite agree with the Lord Ordinary that these provisions cannot take away any jurisdiction which the Court of Session might have, but if there be serious doubt as to such jurisdiction, these legislative provisions for particular remedies are not to be rejected in the consideration of the question of jurisdiction.

My Lords, it appears to me, for these reasons, that the interlocutor appealed from is correct, and I therefore move your Lordships to dismiss the appeal, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

RICHARDSON and CONNELL — DEANS and DUNLOP, Solicitors.

pay the expenses of successfully opposing a water bill in parliament, similar to that in the preceding case. The Lord Ordinary, following the judgment of the Court in Ewing v. Inglis, repelled the reasons of suspension. The suspenders reclaimed. At the advising in the Inner House, their counsel directed the attention of the Court to the circumstance that some of their number were designated in the suspension as commissioners of police. In that character, therefore, they now insisted that they were entitled to sue as a minority complaining of the acts of the majority.

Statement.

The Court disregarded the attempt to alter the title to insist at that stage of the process, and repeated their judgment as in Ewing v. Inglis.

Morrison and others appealed, and founded on the case of Aitchison v. Magistrates of Dunbar, 4th February 1836[1]; while the respondents maintained that the instance being radically defective, could not be cured medio processu.

LORD CHANCELLOR.—My Lords, the decision in this case must necessarily follow that of Ewing v. Inglis. An attempt was indeed made to distinguish this case from that. It was stated that some of the pursuers are commissioners of police; and it was therefore contended, upon the authority of Aitchison v. the Magistrates and Town Council of Dunbar, (upon which I have before observed,) and the case of Goddard v. the Leith Dock Commissioners, in 5 Shaw and Dunlop, 355, that they were entitled to take advantage of their title as such.

Ld. Chancellor's Speech.

[1] 14 D., B., & M., 421.

MORRISON and others v. GLASGOW COMMISSIONERS OF POLICE.

16th Aug. 1839.

Ld. Chancellor's Speech.

It is, I think, quite unnecessary to consider those cases, or how far the present case falls within them; because, although it is true that some of the pursuers are described in the summons as general commissioners of police for the city of Glasgow, it is quite clear, after looking through the summons and the other proceedings, that the title to pursue is not founded upon the possession by those pursuers of that character, but is founded exclusively upon their liability, together with the other pursuers, to police assessments. This case, therefore, is precisely the same as that of Ewing v. Inglis; and I, therefore, move your Lordships to pronounce the same judgment, dismissing the appeal, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

ARCHIBALD GRAHAME—DEANS and DUNLOP, Solicitors.

[16*th August* 1839.]

(Appeal from the Court of Session, Scotland.)

GABRIEL HAMILTON LANG of Overton, Writer in Glasgow, Appellant.[1] (No. 33,)

[*Lord Advocate* (*Rutherfurd*) — *James Anderson.*]

ALEXANDER LANG, residing in Glasgow, Respondent.

[*A. M'Neill* — *MacDowall.*]

Entail — Prohibitory Clause. — The prohibitory clause in a deed of entail provided "that it shall at no rate be "allowable to the said (institute) 'nor any of the substitutes "above named,' to sell off or dispose upon, any part of the "lands and subjects before transmitted, nor to contract "debt, or do any other deed whereby the said lands and "subjects may be adjudged or evicted from the succeeding "members of entail, or their hopes of succession thereto "in any measure evaded."—Held (reversing the judgment of the Court of Session) that there was no sufficient prohibition against altering the order of succession.

Irritant Clause.—A deed of entail contained prohibitions to sell, contract debt, &c.; the irritant clause voided "all such debts and deeds."—Held (reversing the judgment of the Court of Session) that there was no effectual irritancy against sale.

Question, Whether a party who takes under an entail as heir male of the body of the institute is affected by prohibitions directed against "the substitutes above named"?

THE late Gabriel Lang of Overton on 25th September 1766 executed a deed of entail of his estate in favour

2D DIVISION.
Lord Ordinary Jeffrey.

[1] 1 D., B., & M., new series, p. 98; Fac. Coll. 23d November 1838.

"closed record and whole process, repels the defences, and declares and decerns in terms of the conclusions of the libel: Finds no expenses due."[1]

Statement.

"[1] *Note.*—The opinion of the Lord Ordinary is with the pursuer, both as to the want of a sufficient prohibition against altering the order of succession, and the defect of the irritant clause, as not properly applied to the prohibition against sale. He has a firmer reliance, however, upon the second than the first of those grounds of decision.

"The prohibitory clause, where it is thought to be deficient, is very much in the style of the statute of entails, in so far as it runs the prohibition against contracting debts, or exposing the estate to forfeiture or eviction, into that which is supposed to be directed against altering the order of succession, with very little attempt at separation; and it is almost identical in its phraseology with that in the entail of Lochbuy (23d June 1807,) which was found to be in all respects effectual. In these circumstances, it is impossible not to see difficulties in this part of the case. But on the whole matter, the Lord Ordinary is of opinion, that there is still ground enough for holding, that the prohibition is in this case insufficient to prevent altering the order of succession.

"The argument from the example of the statute, in consolidating or running into each other the different clauses, which it is admitted must all substantially exist in a perfect entail, is not thought to be entitled to much weight. The statute by no means professes to give a formula for the construction of such clauses; and it has been definitely settled, by a series of concurrent decisions, for more than a century, that there must be a distinct and independent clause for each of the essential prohibitions; and that the defect of separate expression cannot be supplied either by an extensive construction of words, plainly referable to one such prohibition only, or by inference, however probable, as to the intention of the entailer. The series of exact precedents upon this point begins with the case of Campbell and Wightman, 17th June 1746 (Mor. 15505), and ends prior to the case of Lochbuy with that of Hoome of Argaty, 8th July 1789 (Mor. 15535).

"The case of Lochbuy no doubt then appears as an exception; and if it had appeared to have been fully considered, and had not been discredited by subsequent decisions, might be thought to have established a precedent, by which such a case as the present must necessarily have been ruled. To the Lord Ordinary, however, it does appear both to have been pronounced in circumstances which detract somewhat from its original authority; and to have in point of fact been so largely discredited by more recent decisions, as to be no longer to be relied on. In the first place, it was adjudged at the same time with the case of Roxburghe, and without any separate argument from the bar drawing the attention of the Court to the manifest distinction of the two cases—but apparently on the supposition that both depended on the same prin-

16th Aug. 1839.

Judgment of Court, 23d Nov. 1838.

" The Lords having heard counsel for the parties, and " advised the cases, alter the interlocutor of the Lord " touching the prejudice or disappointment of the substitutes formed " parts only of the description of one and the same class of acts or deeds, " which had been previously characterized as leading to adjudication or " forfeiture, and was a mere continuation of that description; while in " all these cases (except Lochbuy,) where the prohibition was found " effectual, the words touching the disappointment, &c. of the succession, " are distinctly applied to a separate class of acts and deeds, which are " nowhere described as leading to adjudication or forfeiture, and of which " the only description in the entail is, that they may interfere with, " prejudge, or frustrate, the succession of the substitutes. When the " prohibitions, therefore, are separately applied to such acts and deeds, it " would seem impossible to doubt, that alteration of the order of succes- " sion is as effectually prohibited, as if this had been said in express " words, since there is no other quality or consequence ascribed to the " acts in question, on account of which they could be included in the " prohibitions.

" Nothing can illustrate this better than a comparison of the clauses " in the case of Roxburghe, with those which occur in the subsequent " decisions already referred to, where an opposite judgment was given as " to the validity of the prohibition. In the Roxburghe entail there is " first, an express prohibition, ' to contract debt, or to do any deeds, " ' whereby the said estate, or any parts thereof, may be apprized, ad- " ' judged, or evicted;'—thus satisfying and concluding the description " of that class of deeds; and then there immediately follows ' nor yet do " ' any other thing in hurt or prejudice of the foresaid tailzie and suc- " ' cession in haill or in part.' Now upon the principle already stated, " it was rightly adjudged that there was here a sufficient prohibition " against altering the order of succession. Since, after exhausting the " acts and deeds that might lead to apprizing or eviction, the prohibitions " are distinctly extended to a class of ' other things,' which are no other- " ways described than as being ' in hurt and prejudice of the foresaid " ' tailzie and order of succession.' The only subsequent case in which " a similar judgment was given is believed to be that of Lord Buchan, " 9th February 1837, and it was precisely of the same description. " There was there a clear prohibition of ' contracting debt whereby the " ' lands might be apprized or adjudged,'—and then against ' doing any " ' other fact or deed in prejudice of the said tailzie, and of the persons " ' above-named or their foresaids.' In short, after prohibiting acts leading " to adjudication or apprizing, there is here also a distinct prohibition " against other acts, not leading of course to any such result, but only " described as being in prejudice of the tailzie, and the substitutes called " to the succession.

" Contrast now with these the series of cases in which it has since been " found that there was no effectual prohibition, and see whether it be " possible to account for the difference, except upon the plain and reason- " able distinction which has now been indicated. There is, first, the East-

Appellant.—The entail of Overton contains no effectual prohibition against altering the order of succession.

" special argument, under the very unaccountable assumption that it was " not to be distinguished on the merits from that of Roxburghe. In " Lochbuy the prohibition was almost in the words of the present case; " ' to contract debts, or do any other deed whereby the lands might be " ' adjudged or evicted from the succeeding members, or their hopes of " ' succession thereto in any way evaded.' Now there is here, as in all " the other cases, but one class of acts prohibited, the primary characteristic of which is that they might induce adjudication and eviction of " the lands to the disappointment of the succession of the succeeding substitutes, the structure of the clause being totally different from that of " Roxburghe or Strathbrock, and identical in this respect with the cases " first cited, though far less favourable for the prohibition than that of " Brown, Henderson, or Dickson, inasmuch as the words used in these " cases as to the prohibited acts being to the prejudice and defraud of the " substitutes, or their being disappointed thereby of their right of succession, are far better fitted to describe a direct alteration of the order " of succession than those which occur here or in Lochbuy, which are " merely against acts by which their hopes of succession might be ' in " ' some measure evaded,' an expression which is obviously much more " appropriate to some partial and indirect injury, by contraction of debts " or other burdens of that kind, than to a total and direct frustration of " their rights by a deed of alteration. The Lord Ordinary cannot persuade himself therefore that this case of Lochbuy is now of binding " authority, and being the only precedent to which the defenders can " refer in support of this part of their argument, he has not hesitated to " reject that argument.

" 2. The defect in the irritant clause is conceived to be still plainer, " or, at least, the difficulty is not increased by an apparent conflict of " authority. If the rule laid down in the case of Dick (14th January " 1812), that where a word of flexible signification is used in a fixed and " limited sense in one part of a deed of entail, it shall be held to have " that and no more extensive sense when it occurs in any subsequent and " relative part of the same deed, was a sound and correct rule; and if it " be still the law of Scotland, as was found in the late case of Speid, " (21st February 1837) that clauses importing fetters are to receive the " narrowest and most rigorous construction, (and the Lord Ordinary " fully adopts both maxims) it does not appear doubtful that the irritant " clause in this case is not properly applied to the prohibition against " sale. The leading prohibition is expressly against selling or disponing; " and then this is followed up by a continuous prohibition (as already " noticed) against contracting debt or doing any deed by which the lands " might be adjudged or the succession of the substitutes evaded. The " irritant clause follows immediately after, and in reference and connection " with these prohibitions, declares merely that if any of the heirs ' do in " ' the contrary, all such debts and deeds shall be null and void;' and

Appellant's Argument.

operate, not necessarily defeating or frustrating entirely their right of succession. The practical result of the cases which have hitherto occurred on this point, with the exception of the case of Lochbuy, which, as is justly observed by the Lord Ordinary, though not actually reversed has been substantially overruled, is clearly that which is set forth in his Lordship's note.[1]

The prohibition against selling is not effectually fenced by the irritant and resolutive clauses. These clauses are framed on the principle of enumeration of the acts prohibited. They enumerate the debts and deeds specially mentioned in the prohibitory clause, but they do not enumerate sales or alienations. Hence the prohibition against sales and alienations is not properly fenced. But, on whatever principle these clauses are framed, they are susceptible of a construction either exclusive or inclusive of sales and alienations. They must therefore be construed as exclusive of sales and alienations, which is the construction in favour of freedom from fetters.[2]

Respondent's Argument.

Respondent.—The prohibitory clause is conceived in such terms as sufficiently to prevent alteration of the

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[1] Campbell v. Wightman, 17th June 1746, Mor. 15505; Sinclair v. Sinclair (Carlowrie), 8th November 1749, Mor. 15382; Nisbet v. Young, November 1763, Mor. 15516; Stewart v. Hoome (Argaty), 8th July 1789, Mor. 15535; Brown v. Countess of Dalhousie (Eastfield), 25th May 1808; Henderson v. Henderson (Earlshall), 21st November 1815, Fac. Coll.; Dickson (Blairhall), 6th July 1816; Grant v. Tytler (Burdsyards), 9th March 1826, Fac. Coll.; Rowe v. Monypenny (Strathbrock), 9th February 1837, (see post, p. 898); Brown v. Macgregor, 2d March 1837; Little Gilmour v. Caddell, 5th July 1838; Braimer v. Bethune, 18th January 1839; all as in Fac. Coll. under respective dates.

[2] Dick v. Drysdale, 14th January 1812, Fac. Coll.; Barclay v. Adam (Blairadam), 18th May 1821, 1 Shaw's Appeal Cases, 24; Speid v. Speid (Ardovie), 21st February 1837, 15 Shaw & Dunlop, 618; Rennie v. Horne, 13th March 1838, 3 Shaw & Maclean's Appeal Cases, p. 142.

which deprive heirs of entail of the ordinary rights of ownership, that this doctrine is alone applicable; these, and these only, require the statutory formality of being fenced with irritant and resolutive clauses, which clauses create what are called the fetters of an entail. Other provisions are mere conditions of descent, affecting only the heirs who take under and are bound by them, but not their creditors or those who may deal with them, and hence they ought to receive effect inter hæredes, according to the intention of the entailer.[1] Even if the words used may be made as well to comprehend acts which require to be restrained by fetters as an ordinary condition of descent, it is not the less clear that the testator has expressed his intention to impose a simple condition of descent. That expressed intention cannot be legally counteracted, although the words may be susceptible of another meaning, unless it can clearly be shewn that the testator limited his intention to that other meaning. Limitations inter hæredes, as distinguished from statutory fetters, must be construed ut res majus valeat quam pereat. It would be utterly inconsistent with this rule to say, that the expressed intention of an entailer to create a limitation not subject to strict interpretation is to be disregarded, merely because one consequence of the breach of a statutory fetter would be to defeat that limitation.

The present case is identical with that of Lochbuy[2] decided upwards of thirty years ago, and acknowledged as authority since its date. They both fall under that class of cases of which the case of Roxburghe[3] is the

[1] Erskine, b. 3. t. 8. s. 23.

[2] Maclaine v. Maclaine, 23d June 1807, Fac. Coll.

[3] Kerr v. Innes, 23d June 1807, Fac. Coll.; affirmed, 8th June 1811, Lords Journals, vol. 48. p. 376.

by the entailer in connexion with the word "debts," but by removing it from that place, and placing it in connexion with the subsequent word "deeds."

Respondent's Argument.

In the case of Blairadam (ante, 879,) an enumeration was clearly intended, and therefore it was justly held that there had been an omission, but here there was clearly no such intention; neither has the testator in this case, as in the case of Dick, (ante, 879,) fixed a specific meaning upon the word "deeds" in the prohibitory clause, so as to render it necessary that it should be received in the same meaning in the irritant clause.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, in this case of Lang v. Lang the prayer of the summons was, that it might be declared "that the pursuer has full and undoubted "right and power to make up and complete, in his "person, valid titles to the said lands and others, in fee "simple or otherwise, and to alter the order of succession." The question arose on a settlement, which contained the provisions I will state to your Lordships, after settling the estate on a certain succession of parties. Though there is a question raised as to how far the party is within the description, in the view I take of the case, I do not feel it necessary to call your Lordships attention to that question, because it formed no part of the decision below.[1] There are other grounds on which I think the case can be safely disposed of. The prohibitory clause is in these words: "Providing also, as I "hereby expressly provide and declare, that it shall at

Question:—Whether a party who takes under an entail as heir male of the body of the institute, is affected by prohibitions directed against "the substitute above named"?

[1] It was contended, that as the prohibitions were directed against "the "substitutes above named" (ante, p. 872,) they did not extend to the appellant, who took as heir male of the body of the institute.

appear to be disputed, viz. that there must be a distinct prohibition as to the particular matter which is brought under consideration, and that the prohibition of any particular act is not to be inferred from expressions supposed to include it, or as the consequences of some other prohibition.

This being the rule, it appears to me to be quite clear that the cases of Roxburghe and Lochbuy are distinguishable. In the case of Sinclair v. Sinclair[1], (ante, p. 879,) which was so early as 1749, a prohibition against altering the order of succession, granting wadsets, or the doing any other fact or deed that might anywise affect, burden, or evict the lands, or whereby the right and benefit of succession by virtue of the tailzie might be prejudged any manner of way, or whereby the lands might be evicted, adjudged, apprized, &c., was held not to include a prohibition against selling, although the consequences of selling would clearly fall within the mischief intended to be guarded against, and although there were expressions which, separated from the other parts of the sentence, would have described it. The cases of Campbell v. Wightman[2], in 1746 (ante, p. 879,) and Nisbet v. Young[3], in 1763, (ante, p. 879,) proceeded upon the same principle. In the Argaty case (Stewart v. Hoome[4], in 1789, ante, p. 879,) the expressions were less comprehensive than in some of the subsequent cases. I therefore pass over that case, and shall afterwards observe upon the cases of Lochbuy and Roxburghe.

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[1] Sinclair v. Sinclair, 8th November 1749.
[2] Campbell v. Wightman, 17th June 1746.
[3] Nisbet v. Young, November 1763.
[4] Stewart v. Hoome, 8th July 1789.

used in the present case; but all the Judges of the Inner House recognized the principles upon which the preceding cases had been determined; and Lord Corehouse said, "I hold it to be a point as much settled "as any point in the law of entail, that an entail must "contain a substantive prohibition against alienation, a "substantive prohibition against contracting debt, and "a substantive prohibition against altering the order of "succession. There is no set form of words in which "these three prohibitions require to be expressed, nor "is a separate and distinct clause of any given style "necessary for each several prohibition, but the three "substantive prohibitions must be all there, and all of "them expressed."

The last case which has occurred is consistent with all those which I have before observed upon,—Braimer v. Bethune[1], in 1839 (ante, p. 879). The prohibition was, that it should not be lawful to alienate and contract debt, "nor to do or commit any fact or deed, civil or "criminal, whereby the said lands and estate, or any "part thereof, may be anywise adjudged or evicted "from them, or forfeited, or may be anyways affected "in prejudice and defraud of the subsequent heirs of "taillie and provision successively, conform to the order "and substitution above specified." Altering the order of succession was, no doubt, a fact or deed whereby the estate was affected to the prejudice of the heirs of tailzie; but it was held that such fact and deed was not prohibited. Here, then, is a succession of cases for above ninety years, in which the same principle has been acted upon; and how is the present case to be distinguished

[1] Braimer v. Bethune, 18th January 1839.

be given to it as an authority; and one cannot but feel surprised that, after it had been so repeatedly overruled, it should have been made the ground of the decision in the case now under consideration. The case of Roxburghe, which is supposed to have governed that of Lochbuy, is clearly distinguishable from that case and from the present. The objection in this case is, that the expressions relied upon, as prohibiting alteration in the order of succession, are so involved in the prohibition against contracting debts, &c. that they cannot be separated,—that they express rather a consequence of one prohibited act than a distinct prohibition of another. That objection, however, has no place in the Roxburghe case, in which the prohibition against contracting debt, &c. is first completed and exhausted; and then a new sentence is added; viz. "nor zitt to do any other thing in "hurt and prejudice of the aforesaid tailzie and suc- "cession in haill or in part." I do not therefore hesitate to say, that I entirely concur in the opinion of the Lord Ordinary upon this point.

Being of this opinion upon this point, it is not necessary to say much upon the other, viz. as to whether the irritant and resolutive clauses are so expressed as to apply to the prohibition against selling. The prohibition is against selling, or contracting debt, or doing any other deed, and the irritant clause is as to all such debts and deeds,—taking up the very words of the prohibition so far as regards contracting debts, but passing over the prohibition against selling. The cases of Blairadam[1], and of Rennie v. Horne[2], (ante, p. 879,) in this House, appear to me to be conclusive.

[1] Barclay v. Adam, 18th May 1821.
[2] Rennie v. Horne, 13th March 1838.

16th Aug. 1839.

Ld. Brougham's Speech.

of the Lord Ordinary; nothing can be more clear than that there must be a substantive prohibition against selling, against alienating or disponing, against contracting debt, and against altering the order of succession. The question is, have we here a substantive prohibition against that act being done? There must, besides, be an irritancy of the act if attempted to be done, and there must be a resolution of the right of the contravener who has done that act. All these things are absolutely necessary to make it a valid entail, and two of those things are here wanting. There is no absolute prohibition against altering the order of succession, and in my humble judgment there is no irritancy in respect of altering the order of succession if that shall be attempted. When I say there must be a substantive prohibition, and a substantive irritancy, and a substantive resolution, I mean of course this, that each must be self-subsisting, — standing and existing by itself; it must not be merely brought in by way of inference from some other provision directed against some other act. Thus, you cannot by a side wind, and in dealing with the consequences of what you are prohibiting, prohibit at the same time burdening with debt or altering the order of succession. If, for example, you only state burdening with debt or altering the order of succession, as consequent on the act of selling or disponing or alienating, when you are principally and substantively dealing therewith, that will have no effect against those acts; it is not enough to say, "he, "my heir of entail, shall not sell, whereby the estate "may be incumbered or evicted, or the future succes- "sion defeated." That is not a substantive prohibition either against burdening or altering the order of suc-

evaded; but it contains, besides that, another substantive prohibition to do any other deed whereby the hopes of succession may be in any measure evaded, and this latter prohibition necessarily includes alteration of the succession. That, I admit, is one mode of construing it; and if that were the only mode of construing it, it might be fairly contended that there is a prohibition against altering the order of succession, as well as against contracting debt.

But is there not another mode of construing it? most manifestly there is. Observe the words used:—"or con-"tract debt, or do any other deed whereby"—that is, by which debt or by which deed eviction may take place, and an alteration of the order of succession may take place. It is not then a substantive prohibition against altering the order of succession, it is a prohibition against contracting debt whereby that order of succession may be altered, as well as whereby the lands may be evicted. Now, my Lords, I take it to be clear that if there are two constructions open, one of which makes this clause against altering the succession a substantive, and the other only an auxiliary clause,—one of which makes it a complete and separate fetter, and the other makes it not a complete and separate fetter,—you are bound by the principles of the Scotch law of entail to prefer that construction which is in favour of the freedom of the heir. The rule of the Scotch law is, that heirs of entail in succession are fiars; that is the cardinal point; that is the very corner stone of the law of entail in Scotland. The heirs of entail in succession in Scotland are every one of them perfectly free, unless in so far as they are fettered, whereas with us the tenant in

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disposition, to alienation, and alteration of the order of succession. This is an irritancy simply levelled at the last antecedent.

My noble and learned friend has already dealt with the cases on the subject, which dispenses with my going through them, except as regards the case which stands next for your Lordships decision; and as I am obliged to leave the House on other business at present, I shall merely state in passing how I think the two cases differ, because I should recommend to your Lordships, as I know my noble and learned friend is about to do, to reverse the interlocutor in this case of Lang v. Lang, but to affirm that in Monypenny v. Campbell, a case of great importance, but quite distinguishable from the present case. I mention Monypenny v. Campbell as a case prior, in point of decision, to this of Lang v. Lang. Lang v. Lang was in 1838. The Strathbrock case is in opposition to the Lochbuy case, which case is clearly the only one in accordance with the decision of the Court in Lang v. Lang, and against the decision of the Lord Ordinary. The decision in the case of Lochbuy is in the face of all the previous decisions, particularly the case of Strathbrock. It is most decidedly against that case, and I agree with my noble and learned friend in holding it not to be law. It is a painful thing to a court to be reduced to the necessity of saying that a case is not law which has never been reversed, and which has been so far acted upon that it has been adopted as a cardinal decision in this very case of Lang v. Lang; it is the only leg upon which that decision can stand. It is a very unpleasant thing to be reduced to the necessity of saying that a case which has been adduced in the Court below to support the present

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Ld. Brougham's Speech.

case from Lang v. Lang, and affords no authority for it. It is a case, according to strict construction, in conformity with the Roxburghe case, the words in which are, "to "contract debt or do any deeds whereby the said estate "or any part thereof may be apprized, adjudged, or "evicted, nor yet to do any other thing in hurt or pre-"judice of the aforesaid tailzie and succession, in haill "or in part." The Roxburghe case sanctions and governs the Strathbrock case, and is the rule for deciding it. But, for the same reason, these cases do not interfere with Lang v. Lang, although they were decided, the one thirty years, and the other one year before Lang v. Lang. It follows, therefore, that the interlocutor in Lang v. Lang may be reversed, and that in the Strathbrock case consistently affirmed, the one being contrary to the current of all decisions, with the exception of the Lochbuy case, which we hold not to be law, and the other being according to the current of all the decisions, but particularly the decision in the Roxburghe case.

For these reasons, my Lords, I entirely agree with my noble and learned friend in the motion he has made to reverse the judgment of the Court below in the present case, as I shall equally concur in his intended motion to affirm the judgment in the case of Monypenny v. Campbell.

The House of Lords ordered and adjudged, That the said interlocutor complained of in the said appeal be and the same is hereby reversed.

ARCHIBALD GRAHAME — DEANS and DUNLOP, Solicitors.

the following clauses: — "It shall noways be leisome "nor lawful to any of the heirs of taillie and provi- "sion above specified to sell, dispone, and wadsett the "lands, baronie, and others above written, or any part "thereof, or any annual rents or yearly duties to be "uplifted furth of the samen, or to set tacks thereof "for longer space than their own lifetime, or to contract "debt for which the samen may be apprised or ad- "judged, or to do any other fact or deed in prejudice "of the said taillie, and of the persons above named, "and their foresaids; and if any heir of taillie and "provision above specified shall in any time coming "failzie herein, or do any thing contrair to this my "destination and appointment, then and in that case "the person or persons sua failzieing and doing in the "contrair hereof, and the heirs of their bodies, shall "amit and lose their right and haill benefit to this "present bond of provision and infeftment following "hereon, and of the haill lands, baronie, and others "above written, and the samen shall in all time there- "after pertain, belong, and accress to the next person "for the time who, by and in virtue of the said tailzie "and provision, would have succeeded to the said lands "and estate, failing the saids persons, contraveners, "and the heirs of their bodies, and all dispositions and "deeds whatsomever made or done contrair to the said "provision and destination, with all that shall follow "thereon, shall be ipso facto void and null, without "any declarator, and shall noways affect nor burden "the said lands, baronie, and others above written, or "any part thereof, as if the same had never been done, "with and upon the whilks reservations, reversions, "provisions, and conditions respectively above men-

" also the trust disposition executed by the said Earl in " favour of the defender, Mr. Alexander Monypenny " and others, dated 12th June 1822, are contrary both " to the prohibitory and irritant clauses of the original " tailzie of Strathbrock, libelled on, and that the charters " and sasines following on these deeds, or either of them, " cannot have more force or effect than their warrants. " Therefore reduces, decerns and declares in terms of " the libel: Finds the defender quà trustee liable in " expenses, and remits the account thereof, when " lodged, to the auditor to tax and report. Six words " delete before signing."

Statement.

The appellant reclaimed to the First Division of the Court, when the following judgment was pronounced:— " The Lords having considered this note, and heard " counsel, adhere to the interlocutor reclaimed against, " so far as relates to the lands and barony of Strath- " brock, and with this qualification, refuse the prayer " of the note. Of new, find expenses due, and remit to " the auditor to tax the account thereof, and to report."

Judgment of Court, 22d Dec. 1837.

Appellant.—There is no valid and effectual prohibition against altering the order of succession. The cases of Earlshall, Blairhall, Craigievar, Argaty, Eastfield, and Burdsyards completely establish this proposition.[1] The case of Lochbuy[2] cannot be reconciled with these decisions, of which the cases of Eastfield, Earlshall, Blairhall, and Burdsyards were subsequently decided.

Appellant's Argument.

The case of Roxburghe[2] differs essentially from the present. In that case it will be remarked, there is a

[1] See ante, p. 879. [2] See ante, p. 881.

being no voces signatæ required to be used,) but in words which express in clear and appropriate terms that particular mode of disappointing or depriving the heirs substitute of their right to the entailed estate. Applying these observations to the prohibitory clause in the Strathbrock entail, it will be seen at once it contains no effectual prohibition against altering the order of succession. The concluding part of the clause is not separated from the prior parts of it by any properly disjunctive words, as in the case of Roxburghe. It commences with "or," an appropriate introduction to what is merely to render what preceded more comprehensive, by reaching every indirect or possible form in which the taillie, or the persons above named and their foresaids, might be prejudiced by a contravention of the preceding prohibitions; and, accordingly, there is not a single word used which does not admit of, and naturally suggest, that construction. There is no word used that suggests to the mind some other specific class of acts by which the taillie and the heirs called might be prejudiced; on the contrary, in the concluding part of the clause there are only general words,—there is no particular act or class of acts set forth as prohibited,—there is nothing more than what forms an appropriate sequence, introduced for the purpose of more effectually securing the taillie, and the persons before named, against the classes of prohibited acts previously enumerated.

But, again, it is an undoubted rule, in construing the fetters of an entail, that if the words used be susceptible of two interpretations, that is to be adopted which is against the fetters. Now, there is this further essential difference between the Roxburghe case and the present. In the Roxburghe case the words are

"destination, with all that shall follow thereon, shall be "ipso facto void and null." The appellant apprehends that this clause is clearly defective from uncertainty. Suppose the words, "and destination," had been omitted, there would no doubt be a voidance declared of all dispositions and deeds made or done contrary to the said provision, but then the question at once arises, what provision? The irritant clause refers to the prohibitory clause. Its object is to irritate the deeds done in contravention thereof, but the prohibitory clause contains various provisions. It contains a provision against selling, disponing, and wadsetting, — a provision against letting leases exceeding a certain limited duration, — a provision against contracting debt; and, according to the argument of the respondents (which the appellant here assumes to be well founded, for otherwise he has no interest to inquire into the validity of the irritant clause), a provision against altering the order of succession. Now, to which of these does the word "provision" apply? It is evidently impossible to answer; but then it may be said, that the term "provision" applies to the whole of the prohibitory clause, to every thing therein provided, and that consequently there is a complete irritancy declared of all dispositions and deeds in contravention of any of the prior prohibitions. This plea the appellant humbly conceives not to be tenable; but it seems unnecessary to go into any argument, either in refutation of it, or in support of the appellant's objection to the clause in respect of uncertainty, because the same question occurred very lately in the case of Speid[1], where the

[1] 21st Feb. 1837, 15 D., B., & M., 618.

defective, or would apply only to the prohibition against altering the order of succession, then, upon the authority of the cases of Hoddom[1] and Speid, the deeds under reduction are unchallengeable, because the necessary result of these cases is, that an entail defective in one particular is ineffectual in all other respects.

Appellant's Argument.

Respondents.—The present case is identical with that of Roxburghe; the entail in each of them is conceived in terms which announce a distinct and explicit prohibition to alter the succession, and this being so, it is utterly unimportant that the disjunctive used in the one case is "nor yet" and that in the other "or." The omission of the word "evicted" might afford an argument, if the act under consideration had fallen under the denomination of acts alluded to on the other side. Whatever may be its effect as to such an act, when the point comes to be considered it is obvious that the Roxburghe case has clearly fixed the application of the subsequent prohibition to an alteration of the succession which may be effected without eviction.

Respondents Argument.

It is altogether contrary to the law, as hitherto known in Scotland, to say, that an entail defective in one particular is altogether defective.[2] The irritant clause in the present case is sufficiently applicable to alterations of the succession, if irritant clauses were necessary for this purpose. In order, however, to prevent alterations of the succession, as distinguished from the statutory acts which may indirectly have that effect, irritant

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[1] 3d July 1832, reversed 18th April 1835; 1 Sh. & M'Lean's Appeal Cases, p. 594; Lords Journals, vol. 67. p. 114.

[2] Cathcart, 5 Wilson & Shaw, 315.

in the two cases being so substantially the same as to require the same decision.

Assuming then that there is an effectual prohibition against altering the succession, an objection was taken that there are not proper irritant and resolutive clauses applicable to such prohibition, to which it was answered that in cases of simple destination such clauses are not required; be that as it may, I think it clear that in this case there are such clauses sufficiently applicable to the purpose. The term "deed" is only to be found in the prohibition against altering the succession; the resolutive clause applies to any thing done "contrair to this "my destination and appointment," and that which is avoided or declared null is "all dispositions and deeds "whatsomever made or done contrair to the said pro- "vision and destination." If, therefore, clauses irritant and resolutive against altering the order of succession are necessary, they are, I think, to be found in this entail. The question is not here, as in the case of Lang, whether there are clauses properly fencing the other prohibited acts. I think, therefore, that, upon the points raised, the interlocutors appealed from are correct, and that these interlocutors should be affirmed, and the appeal dismissed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party

[*23d August* 1839.]

(Appeal from the Court of Session, Scotland.)

THOMAS DUNCAN, Writer in Perth, Treasurer to, and on behalf of, the Trustees for the Turnpike Road from Perth to Dundee through the Carse of Gowrie by Inchture, Appellant.[1] (No. 35.)

[*Attorney General* (*Campbell*)—*Lord Advocate* (*Rutherfurd*).]

JAMES FINDLATER, Coal Merchant and Innkeeper in Perth, Respondent.

[*Pemberton — James Anderson.*]

Reparation — Road Trustees — Public Officer. — Held (reversing the judgment of the Court of Session) that road trustees on a public road are not liable for any injury which may happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors or other persons employed by the trustees, or by the officers of the trustees, when engaged in any operation performed under the authority of the trustees.

Practice — Issue. — Under an issue, Whether a particular act has been done to the "loss, injury, and damage" of a party, it is left open to try the question of the damage, and the liability of the party causing the damage to make compensation. — Per Lord Chancellor, confirming the opinion of Lord Eldon, Chancellor. (See p. 926.)

Practice — Pleading — Preliminary Defence. — In an action directed against the clerk and treasurer of road trustees, acting under the statutes, for injury sustained by alleged negligence on the part of persons employed by them,

[1] 15 D., B., & M., 1304; S. C. 16. D., B., & M., 1150.

" thereof, and shall permit the same to remain longer " than necessary for the breaking and spreading of such " materials, or shall lay on any such road any matter or " thing, or shall knowingly permit to remain on any " part of any such road any matter or thing which may " endanger the safety of any passenger, or shall dig any " pit, or make any cut on any turnpike road without " sufficiently fencing the same, such person shall for " every such offence forfeit and pay a sum not exceed- " ing 5*l.*, over and above the damages occasioned " thereby, and expenses; and it shall be lawful for any " person travelling along any turnpike road to pro- " secute for such sum, damages, and expenses in " manner herein-after provided." By sec. 109. the trustees or the procurator fiscal, or any person authorized by the trustees, are empowered to prosecute for payment of toll duties, penalties, or fines due under the statutes; the enactment declaring, " that it shall be " lawful for the said trustees to allow the expenses of " such prosecutions to be defrayed out of the funds of " the trust." Sec. 117. provides, that " if the repair- " ing or maintaining of any turnpike road shall be " neglected, or such road so badly kept that travellers " are injured, impeded, or obstructed in using the same, " any person having paid toll duty thereon, and finding " caution to pay expenses of process, may present a " petition and complaint against the trustees of such " road to the Court of Session, and the said court is " hereby authorized to receive the same, and to adjudge " and determine therein in a summary manner, without " abiding the course of the roll; and to pronounce " such orders and decrees as to the repairing and keep- " ing of the road, or otherwise, as the justice of the

" ing, upholding, and improving the aforesaid roads " and bridges thereon respectively, in such manner as " the said trustees shall think fit; and paying the " expense of management, interest of the money bor- " rowed, advanced, and owing at the time; and the " surplus shall be appropriated annually to extin- " guish the principal of the money so borrowed, " advanced, and owing, and to no other purpose " whatsoever."

James Findlater, coal merchant in Perth, while driving a gig at night along the turnpike road between Dundee and Perth, near Inchture, came in contact with a large heap of stones placed partly on the footpath, and partly on the road. There was no light set up or watchman posted, or any other precaution taken to warn travellers as to the state of the road. The stones had been placed there by persons in the service of a contractor employed by the road trustees, for the purpose of filling up a drain which had been dug across the road. The gig was overturned, and the son of Findlater, who was along with him, received so much injury in consequence of the accident that he died soon after; Findlater was also himself considerably injured.

Findlater brought an action in the Court of Session against the road trustees, libelling that the obstruction on the road had been occasioned by the operations carried on by the road trustees " or their surveyors or " contractors, or other person or persons for whom " these trustees were and are responsible;" and that the trustees, " or their workmen or others employed by " them as aforesaid, did knowingly and most culpably " permit that aforesaid part of the north side of the " road to remain in this state of danger till the follow-

DUNCAN v. FINDLATER. 23d Aug. 1839

Statement.

the issue sent to trial:—" Whether the pursuer and his " son, while travelling in a gig along the said road, near " the west half-way house, were overturned through the " fault or negligence of the said trustees, or others in " their employment, to the loss, injury, and damage of " the pursuer? Damages claimed: for reparation, and " as a solatium for the loss and deprivation suffered by " the death of the pursuer's son, 500*l.*; for compensa- " tion and reparation for injury sustained and expenses " incurred by the pursuer in the premises, 500*l.*"

At the trial the Lord President directed the jury, in point of law, " that road trustees on a public road are " liable for any injury which may happen to passengers " in consequence of the negligence or improper conduct " of labourers or surveyors or other persons employed " by the trustees, or by the officers of the trustees, when " engaged in any operation performed under authority " of the trustees." The jury found for the pursuer as follows: viz. damages for loss of his son 500*l.*, for injury received by himself 300*l.*

The appellant excepted to the above direction.

The First Division of the Court, having advised the cause upon the bill of exceptions, after an oral debate, and cases, disallowed the bill of exceptions by the following interlocutor:—" The Lords, having advised " the cases for the parties, disallow this bill of exceptions, " and find the defenders liable to the pursuer in the " expenses incurred by him in the discussion on this " bill, and appoint an account thereof to be given in, " and remit to the auditor to tax the same, and to " report." The First Division thereafter applied the verdict as follows:—" In respect of the verdict found by " the jury, on the issue in this cause, the Lords decern

Judgment of Court, 19th June 1838.

Judgment of Court, 22d June 1838

terms used in the statutes in providing the remedy are, in point of legal construction, exclusive of any other manner of proceeding than that therein pointed out.

The statutes are in perfect consistency with the general principles of law applicable to such questions. The general maxim is, culpa tenet suos auctores. This maxim has been extended to infer vicarious liability only in cases where public policy imperatively requires that it should be so extended.

It is contended, however, that the law of Scotland establishes the judgment appealed from, and certain cases are cited to support that proposition. These cases do not apply. The question is not, how the law of Scotland has dealt with the maxim qui facit per alios facit per se; the question is, what is law of Scotland under the existing turnpike statutes; and none of the cases referred to can have the slightest application to this question. The appellant's argument in the Court below (as it is now) was almost entirely founded upon the particular enactments in the road statutes relating to this question, and yet it will be seen that the judges when delivering their opinions do not once allude to the statutes or any of the enactments in them. But even independently of the statutes the rule of law in Scotland in reference to the maxim qui facit per alios, is clearly adverse to the claim of the respondents.[1]

There being no authority in the law of Scotland adverse to the plea of the appellants, and this being a case as to the construction of a British act of parliament, it is conceived English cases must be of perfect authority, the more especially as the meaning and import of similar

[1] Linwood v. Vans Hathorn, 11th March 1817. Fac. Coll.

road trustees.[1] The same view of the law has been taken by the Court under police statutes.[2] Such being the rule of law in Scotland, it is irrelevant to inquire into the law of England, even supposing that a different principle existed in that country. But the English cases founded upon by the appellant do not bear at all upon the present question. The object in these cases was, to render the parties against whom the suit was directed personally responsible for injury sustained by individuals, being the necessary consequence of works authorized by the legislature to be performed by them. The respondent, however, has not averred that there was misconduct on the part of the trustees which renders them personally responsible. There is no question raised on that point. The case of the respondent is, that in consequence of the negligence of those employed under the trustees the funds of the trust are responsible. [*Lord Chancellor.* — Can property be liable for damages without some party being found liable?] The parties guilty of the negligence may be liable for the consequences; the trustees will have their action of relief against them, but according to the principle recognized in Scotland in such cases, the party suffering the damage is entitled ante omnia to be indemnified from the trust funds.

It is said that the remedies given by the general turnpike act and the relative local statute are exclusive of any proceeding against the trust funds. It is humbly conceived that this is not so; on the contrary, the true principle applicable to both statutes seems to be, that

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[1] Gunn, 28th Feb. 1820, 2 Murr. 194; M'Lauchlan, 14th May 1827, 4 Murr. 216; Millar, 17th July 1828, 4 Murr. 563.

[2] Nimmo, 8th July 1832, 10 S. & D. 844; Kelly, 22d Jan. 1833, 11 S. & D. 287; Mitchell, 1 Feb. 1838, 16 D., B., & M., 409.

Respondent's Argument.

the purpose of which is to have the direction of the judge upon matters of law arising out of the record reviewed. [*Lord Chancellor.* — The Lord President clearly thought that the question of liability was embraced in the issue.] The issue cannot be held to embrace a question not raised by the pleas in law.

Ld. Chancellor's Speech, 8th July 1839.

LORD CHANCELLOR.—My Lords, this case on the merits is one of very great importance, and I should be very sorry to be called upon to advise your Lordships upon it, without taking some time to examine into the cases which have been referred to. The point upon the merits is one startling to the ears of an English lawyer, namely, that for damage sustained by the conduct of persons in the execution of a public trust, the party sustaining the injury has a remedy, not against the immediate author of the injury, or against the trustees personally, but that he has a direct remedy against the trust fund, by suing, not the trustees, but the officer of the trustees who has the custody of the trust funds. It is admitted that the effect of this judgment, if it stands, will be, not to give a remedy against the trustees, who may be supposed to be the authors of the injury, but against the trust fund; and if that is exhausted in the payment of the damages, that it must be supplied by a taxation upon the public.

There is no such principle in the law of England, and though certain cases have occurred in the Court of Session apparently producing this effect, I have not heard any principle referred to which would have originally supported that decision. If that principle had been part of the law of Scotland, your Lordships may be assured the industry and learning of the counsel would

certainly as large as can be well conceived. The third plea appears to be a general plea of not guilty, opening to the party sued every possible ground upon which he could make out that he was to be discharged from the obligation sought to be imposed upon him by the pursuer; it is, that the injury complained of "not "having arisen from misconduct on the part of the "trustees or any person for whom they are in law "responsible, or from any cause for which they are "legally responsible, the defender is entitled to absol- "vitor." Thus, (leaving out that part which does not immediately refer to the present subject,) the proposition is, that the injury complained of was not sustained from any cause for which the defenders were legally responsible; it is in short a plea of not guilty, alleging that there is no cause of action.

Then upon that plea an issue was directed, and another question arises upon the terms of the issue, namely, whether it did not involve a proposition of law. The question sent to trial before the jury was, "Whe- "ther the pursuer and his son, while travelling in a gig "along the said road, near the west half-way house, "were overturned through the fault or negligence of "the said trustees or others in their employment, to the "loss, injury, and damage of the pursuer?" not simply whether the injury arose from the negligence of persons in the employment of the trustees, and what damage had been sustained in consequence of such injury, but whether it has been sustained "to the loss, injury, and "damage of the pursuer."

Now it is said that, according to the acceptation of those terms in Scotland, it makes no difference in the import of an issue, whether the inquiry be if the act

of the damage, and the liability of the party causing the damage to make compensation; and so I must understand the meaning of the terms here. I find that the Lord President lays down, as a proposition of law, that which according to the construction put by the respondent he had nothing to do with. If the respondent's construction of the issue be correct, the jury had nothing to do but to ascertain the fact whether the injury was sustained in consequence of the act of the trustees, and the amount of the damage; but the Lord President lays it down, "that road trustees on a public road are liable "for any injury which may happen to passengers in "consequence of the negligence or improper conduct "of the labourers or surveyors or other persons em-"ployed by the trustees, or by the officers of the "trustees when engaged in any operation performed "under the authority of the trustees." Upon that ruling the bill of exceptions was tendered, and in the argument on the bill of exceptions it was never contended that this ruling was immaterial, that it was not within the province of the judge to lay down the law, or that it was immaterial how he laid it down. It is clear that it was not so argued in the Court below from the opinions of the judges, which are printed in the cases; but whatever is the meaning of the issue, if the judge in laying down the law lays down an incorrect rule for the jury to act upon, which is likely to have an effect upon the finding of the jury, the party against whom the verdict passes will have a right to complain that a rule was laid down which might influence the verdict under which he was suffering. I therefore cannot but think that your Lordships have the question to decide whether the rule of law laid down by the Lord Presi-

in Scotland is of the year 1798[1], notwithstanding which the authority of the English decisions, as applicable to the rule to be hereafter followed in Scotland, has been objected to, as an attempt to overrule Scotch law by the weight of decisions in England. Nothing can be more important than to preserve the integrity of Scotch law in cases in which that country has law distinct from that of England.

The titles to property, and the rights and interests of individuals in Scotland, are regulated by the laws of that country, and, undoubtedly, all such laws ought to be maintained. But in cases in which there is no peculiar law of Scotland applicable to the subject matter of a contract between parties, when questions arise to which no preceding principle of law can be satisfactorily applied, there is great inconvenience, and a degree of reproach to the law itself, in the adoption in the two countries of different and inconsistent rules in the administration of justice; and this can never be more strongly felt than in cases in which the questions arise from enactments by the legislature which are common to both.

In looking through the papers in this case, and upon referring to the authorities quoted, I have in vain sought for any rule or principle of Scotch law, applicable to this question, which would lead to the adoption of a course of decision peculiar to that country. So far from finding any principle in the law of Scotland for making the liability of persons for the acts of others acting under their presumed authority greater than it is in this country, I find the rule laid down in Lin-

[1] See ante, p. 920.

provision of the statute, is without redress. That was the decision in the British Plate Manufacturers v. Meredith [1], and Bolton v. Crowther.[2]

In the former class of cases the actions were in some, if not in all the instances, against the clerk or person provided by the statute for the purpose of being sued on behalf of the trustees; so that if the plaintiff had obtained judgment the remedy would have been against the trustees as such, and not against them individually. The opinion of the court in all those cases having been in favour of the defendant, it was not necessary to consider the effect of the judgment as against the trust fund; but the opinions of the judges, as reported, shew that they considered the course of proceeding adopted by the plaintiff to apply to the defendants in their official capacity, and not to infer personal liability. Lord Wynford, in Hall v. Smith, says, "We think that "under these circumstances the commissioners are "not responsible for the accident that has happened, "and that the actions cannot be maintained against "their clerk."

The first case referred to as having arisen in Scotland is Innes v. the Magistrates of Edinburgh, 6th February 1798.[1] In that case the injury, which the pursuer had sustained, arose from a defect in the streets created in the progress of works for rebuilding the university, under the direction of trustees, and he sued such trustees, and also the magistrates. The court held the trustees not liable; the liability of the magistrates was indeed estab-

[1] British Plate Manufacturers v. Meredith, 4 T. R. 794.
[2] Bolton v. Crowther, 4 Dow. & Ry., 195.
[3] Innes v. the Magistrates of Edinburgh, 6th February 1798, Mor. 13189.

in the respondent's case,) was compromised. The two last cases are instances in which the liability of trustees was assumed, but neither of them has the weight of decision, except in so far as in the former the opinion of the Chief Commissioner was expressed to that effect.

Several cases have been referred to of suits instituted against the Commissioners of Police of Edinburgh, and particularly one at the suit of Mitchell. I abstain from making any observations on those cases because much may depend upon the act of parliament under which those commissioners act; and because the latter case is now under appeal before this House; and it would, therefore, be improper to prejudge the merits of that case.

Such is the state of decisions in England and in Scotland upon this subject. The learned judges of the First Division state that the law has been fully established in Scotland; and upon that authority, and from what appears from the reported cases, there cannot be any doubt that there has been for some time past a course recognized in Scotland in conformity with the decision in this case; but when the cases which have occurred there are examined, it does not appear that there has been any solemn decision of the Court of Session establishing the law before this case. If the decisions had been of much earlier date, and of much more weight, from repeated recognitions by the Court of Session, it might still have been the duty of this House to correct an error which this House might find to have led to such a course of adjudication, but in the present case the House has not any such difficulty to overcome.

Independently, therefore, of authority, it remains to be considered what are the merits of the case upon the

Now, the law as laid down would amount to this, that road trustees (that is, the road funds under their control, for such is stated to be the character of the suit,) are liable for an injury happening to a passenger, from the improper conduct of any person when engaged in any operation performed under the authority of the trustees. That the conduct of such person was not in due execution of the purposes of the act constitutes part of the proposition, for otherwise it would not be improper. The result, therefore, of such a rule of law would be, that (however improper the conduct of any person employed by the trustees or their officers, though wholly unauthorized by the trustees, and though unconnected with their employment,) all damage arising from such conduct would be to be compensated out of the funds of the public in the hands of the trustees,—a proposition not supported by any principle of law, regulating the liability of trustees for the acts of their servants.

How much greater latitude is to be adopted in claims against the present trust fund will be best seen by referring to the statutes. The general turnpike act by the tenth section authorizes the trustees to appoint superintendents, surveyors, and other officers. This must include a contractor, by whom the work is to be carried on. So far then the trustees were acting under the powers of the statute. The 16th section authorizes suits against the trustees in the name of their clerk; the 101st section gives a remedy against any surveyor or contractor who may leave any materials improperly on the road, by means of a penalty of 5*l.* in addition to the damages sustained. The particular statute, under which the defenders are trustees, authorizes the levying certain tolls and duties. The 4th section appoints trustees, very many in

creating the damage as to render their property liable, but none in which the trust funds ought to be applied in satisfaction of the party injured.

Ld. Chancellor's Speech.

Finding, therefore, the rule of law clearly established in England, and nothing in the law of Scotland which authorizes a contrary course of decision, I cannot hesitate to say that I think this is a case in which the practice in Scotland has been erroneous, and ought to be set right; and this, I think, ought to be effected in this case, by reversing all the interlocutors appealed from, the first of which is that which directed the issue, because, as the ground of defence, which I think ought to prevail, appears upon the summons itself, and in the defences as originally made, the cause was, before the interlocutor directing the issue, in a state which would have enabled the court to dispose of it. However, after the course of practice which has prevailed in Scotland, I do not think that the defender is entitled to any costs of the suit, and of course there can be no costs of this appeal.

Interlocutor directing an issue reversed, in respect the question might have been disposed of on the pleadings.

Ld. Brougham's Speech.

LORD BROUGHAM.—My Lords, I entirely agree in the view my noble and learned friend has taken of this case,—a case of no ordinary importance, whether we regard the law of that part of the kingdom where it was decided, or the rights and liabilities of trustees, bodies of men acting oftentimes in very difficult circumstances. I also entirely agree in the doctrine, that this, a Scotch law question,—referring to Scotch practice, decided in a Scotch court, and coming to your Lordships as judges of appeal from that court,—is to be disposed of by you as if you yourselves were judges in a Scotch court,—that the principles of Scotch law, whether to be found in text writers or in

DUNCAN v. FINDLATER. 23d Aug. 1839. Ld. Brougham's Speech.

no case of a date prior to 1820 relating to turnpike trusts, and trusts of a similar description, is admitted; that therefore there is no rule of law solemnly recognized and laid down by the court as to the liability under such trusts, is not denied. But it may be that some general principle exists extending the liability of persons further, through their agents, than the law of England allows that liability to exist here. When we come to examine that, however, we find that it is quite otherwise, and that this liability, according to the general principles of Scotch jurisprudence, is more restricted than according to our principles of jurisprudence. The case of Bush v. Steinman[1] in the Court of Common Pleas was a decision which gave perfect satisfaction in Westminster Hall,—a decision perfectly consonant to a crowd of other cases,—and yet that case of Bush v. Steinman I take upon me to say would not have been so decided in Scotland.

The case was this: a person had employed a builder to do work for him; that builder employed a sub-contractor, that sub-contractor employed a person to bring the materials; the person who was to bring the materials, not the contractor in the first instance, or the sub-contractor in the second instance, but a person three off from the gentleman who had given the orders so to have the work done for him, brought the materials, and laid them down in a negligent and careless manner, so that an individual had his carriage damaged thereby; that individual brought his action against the gentleman who had employed the contractor to do the work, and the consequence was that he recovered damage. A motion

[1] Ante p. 930.

question; it will also destroy and abrogate the authority of the previous cases which proceed upon the same principle; it will set right the administration of the law, and make it inconsistent with no decision up to the period of 1820; and it will make it consistent with the general principle of Scotch law, and make the Scotch law in this matter not only consistent with its own general principles, with respect to the liability of agents and other persons, but it will likewise make it entirely consistent with the law of England.

I also agree with my noble and learned friend that all the interlocutors appealed from ought to be reversed, and I also agree with him as to costs. The costs of the appeal of course cannot be given, and it would be highly expedient and proper toward the parties that the pursuer should not be saddled with the costs in the Court below; he has not been so, and I apprehend he ought not to be.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal, of date the 10th of March 1837, and the 19th and 22d of June 1838, be and the same are hereby reversed, with this declaration, that neither party shall be liable to the other party in expenses in the said Court of Session.

RICHARDSON and CONNELL—DEANS and DUNLOP, Solicitors.

" Under existing circumstances I feel anxious to pro-
" vide for you after my decease, as far as in my power,
" and with that view I shall, at my decease, leave a
" declaration acknowledging you as my lawful wife,
" which will secure to you the annuity payable from the
" Widows Fund of Writers to the Signet. It is of the
" utmost importance that this intention should not be
" made known, as utter ruin, in that event, must fall
" on me, and were I to show or give you possession of
" the declaration, I would then be compelled to an-
" nounce the fact to the Collector of the Widows Fund
" within three months, under forfeiture of the annuity.
" The declaration, therefore, shall only be delivered at
" my decease, in the event of the most strict secrecy
" being adhered to regarding this communication; and
" I hereby declare, that in the event of the contents of
" this letter being made known to any other person or
" persons, except your father and mother, the letter shall
" be of no avail, and shall in no manner of way be
" held as binding, or used as a document against me.
" I am," &c. This document was antedated 25th January 1824. On receipt of this document the respondent wrote and presented to the appellant the following:—
" 1834, March 8th. Dear Edward, I do hereby declare
" to take you for my lawful husband, in terms of the
" document which you have made out, and that I will
" not make it known to any but my father, mother, and
" those friends which I wish to be on terms of intimacy
" with. But should the fact become known, and I have
" no hand in it, I will not hold responsible, nor forfeit
" my claim. I will do all to conceal it. Yours," &c.
In reference to this latter document it was averred on record by the appellant " that on perusing it, as it ap-
" peared to him to have been written for a sinister pur-

that it "was written in order to satisfy the respondent "about her annuity."

On the 2d of April the respondent applied to Mr. Robert White, W. S., as her law agent, and, in consequence, after consulting counsel, a summons of declarator of marriage was prepared. An arrangement then took place, the nature of which was very differently described by the contending parties: by the respondent it was stated that the appellant had agreed, in writing, to acknowledge her status in the most unequivocal manner; the appellant, on the other hand, averred that the only obligation on his part was, that he should make an adequate provision for the respondent by means of annuity. In terms of said arrangement, (whatever might have been the true nature of it,) the parties proceeded to the house of Mr. White together, on the 22d April 1834. The respondent went into Mr. White's house, and the appellant waited for her in the street. The respondent afterwards rejoined the appellant, when she informed him that she had obtained from Mr. White the summons and the letters above mentioned. The parties afterwards went to South Queensferry in a street coach, and lunched there. While there, the respondent showed the appellant the papers she had received from Mr. White; upon which the appellant observed, that Mr. White must be in possession of other documents. The respondent then transcribed and delivered to the appellant the following letter, addressed to Mr. White: "As Mr. Hoggan and I have now arranged the matter, "I withdraw all proceedings, and request you to deliver "the whole papers, originals, copies, and drafts, still in "your possession, connected with this business, to the "bearer, who will settle your account. I am," &c. The parties then agreed to cross the ferry, and before

"anxiously besought her parents. He warned her, at "the same time, that if she mentioned the destruction "of the documents, he would cast her off entirely." The appellant denied this version of the transaction; he admitted that the letters, &c. were destroyed, but he averred that this was done with the respondent's express consent and approbation.

After moving about for some time to different parts of the country, and for a short time separately, the appellant took a house for the respondent in Edinburgh; but, on the morning after the respondent had entered the house, the appellant having peremptorily refused to acknowledge her as his wife, or to permit her to be addressed as such, she removed to the house of her parents. The present action of declarator of marriage was then instituted.

Upon closing the record a proof before the commissaries was ordered in support of the averments therein respectively, and the same having thereafter proceeded before the commissaries, the respondent, in the course of it, called Mr. Robert White, writer to the signet, as a witness, to whose admissibility the appellant objected; and she likewise called as witnesses George Craigie, her father, and Ann Craigie, her sister, to whose admissibility the appellant also objected. The commissary-examinator made avizandum with these objections to the Lord Ordinary, and his Lordship repelled in hoc statu the objection to the admissibility of the said Robert White as a witness, reserving the effect of what might be brought out in his examination in initialibus, and made avizandum with the debate on the objection to the admissibility of the said George Craigie and Ann Craigie, the father and sister of the pursuer, as witnesses. Mr. White having thereafter

" repels the objections offered by the defender to the " admissibility of the pursuer's father and sister, as wit- " nesses: and also repels the objection to the question " put to the witness, Robert White, and appoints the " sealed packets referred to in the minutes to be " opened, and to form part of the process." [1]

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[1] " *Note.*—The Lord Ordinary, upon again considering the objection to " the examination of the pursuer's father and sister, is rather confirmed " than otherwise in his former opinion. The general rule unquestion- " ably is that witnesses so circumstanced must be rejected, and the Lord " Ordinary fully concurs in the opinion that actions like the present " do not necessarily demand any relaxation of that rule. When a pursuer " founds upon an alleged private and irregular marriage, it would be most " dangerous to permit her to urge as a matter of right the secrecy of the " transaction, as in itself a sufficient ground for obtaining the testimony " of her near relations, the very persons who have the strongest motives " for colouring or perverting the truth, and who, on the supposition of " her averments being unfounded, are presumably the very persons with " whose assistance the measures of the pursuer have been contrived. " But the rule is not without exception. Even in the latest case, mainly " founded on by the defender, that of Stewart v. Menzies, (post, p. 957,) " the Court, in expressing their opinions, took for granted that circum- " stances might emerge in the course of the proof warranting the exami- " nation of the witnesses objected to on the ground of relationship, and " accordingly, on the strength of such circumstances, a brother of the " pursuer was afterwards examined.

" Now, it does appear to the Lord Ordinary that the present case falls " within the exception.

" It is established by the documents in process, at least by copies, of " which the accuracy is admitted, that the defender did address several " letters to the pursuer, which, to say the least of them, are of a very " equivocal character. Independently of the sense attached to them by " the defender, by profession a man of business, the construction put " upon them by the pursuer, the comparatively inexperienced individual " to whom they were addressed, especially if that construction was known " to the defender, is a point which may be of very great importance. In " this view it is essential to ascertain the whole circumstances relative to " the acceptance by the defender of the pursuer's letter of the 8th of " March, the terms of which are, for the first time, admitted in the " minute. The defender, in his deposition as a haver, admits that he " received that letter and burnt it, but the addition to that testimony that " it was so burned in the presence of and with the consent of the pursuer, " is clearly not conclusive evidence. The only information attainable " upon all those matters is to be sought for in the examination of the " pursuer's near relations, to whom, by the most positive injunctions of

" opposing the reclaiming note, and remit the account " thereof to the auditor to tax the same and report, and " remit to the Lord Ordinary to proceed farther, as " shall be just."

The cause was then debated on the merits, and avizandum having been made with the debate and whole process, the following interlocutor was pronounced by the Lord Ordinary:—" 7th March 1837. The Lord " Ordinary having heard parties procurators at great " length, and thereafter considered the proof adduced, " productions and whole process, finds facts, circum- " stances, and qualifications proved relevant to infer " marriage between the pursuer and defender: Finds " them married persons, husband and wife of each " other, accordingly: Therefore, ordains the defender " to adhere to the pursuer, and to cohabit with, treat, " cherish, and entertain her as his wife, in terms of the " conclusions of the libel, and decerns: Finds the " defender liable in expenses; and allows an account " thereof to be given in, and to be taxed by the auditor: " Farther, and in regard to the conclusion for aliment " in case of non-adherence on the part of the defender, " appoints the cause to be enrolled, that parties may be " heard thereupon."[1]

[1] " *Note.*—The question will be found to depend in a great measure, if " not entirely, upon the import of the writings which passed between the " parties in March 1834. The Lord Ordinary has felt it to be one of " considerable difficulty;—a difficulty arising from the very equivocal " mode of expression used, and, as he cannot help thinking, intentionally " used by the defender in these letters. They are certainly not the letters " of a person intending to declare, without subterfuge or ambiguity, a " present intention to contract marriage, merely qualified with the con- " dition that it should be kept secret. They have as little the appearance " of letters unequivocally intimating to the party to whom they are " addressed that the connexion had been, and was to continue illicit, " and undertaking merely an obligation for a pecuniary provision. There

pronounced the following interlocutor: — "17th Feb. "1838. The Lords, having resumed consideration of

"explicit, it is a letter which might have been written by a party, who, "knowing and admitting that he was married, stipulated only for the "delay of the delivery of a document, which would at once enable the "other party to declare it. And with reference to this last construction, "the circumstance of the antedating of the letter is not immaterial. It "is admitted that this was done to please the pursuer; and as she was "then pregnant, there was an intelligible object in the antedating of the "letter, if it referred to an existing marriage; while, according to the "view of the letter taken by the defender, the antedating is utterly inex-"plicable and unmeaning.

"But that letter must not be taken singly,—it must be combined with "the rest of the correspondence. It was followed by the letter from the "pursuer of the same day, commencing, 'Dear Edward, I do hereby "'declare to take you for my lawful husband, in terms of the document "'which you have made out,' &c. One fact regarding this letter is "admitted, viz., that it was delivered to the defender, although he denies "that he retained it, but avers that he objected to it, and threw it into "the fire in the presence of the pursuer. Upon these last points there is "no evidence on either side,—certainly no conclusive evidence. For the "Lord Ordinary cannot view in that light, the inferences drawn respec-"tively by the parties, from the statements made to counsel, and the "correspondence which took place relative to the opinions of those "counsel. The admitted fact, however, of such a letter being written "and delivered to the defender, is evidence of the meaning attached by "the pursuer to the preceding letter of the defender, and is also evidence "of the communication by her to the defender of the meaning so put "upon it; and it would rather appear to the Lord Ordinary that the "defender was bound to produce something more conclusive than his "own mere averment of his rejection of that letter. As the correspon-"dence did not stop there, the continuance of it clearly allowed the "opportunity of placing this matter beyond the reach of doubt. But it "so happens that the remaining part of the correspondence fortifies the "presumption that the pursuer's letter had not been repudiated by the "defender, and is, according to every probability, nearly irreconcileable "with his statement upon this subject.

"The next letter, that of 29th March 1834, begins, 'Dear Eliza-"'beth, It is most assuredly my intention to provide for you to the "'utmost extent my means will permit during the remainder of your "'life, while we are separate from each other,' and it is admitted that "the last member of this sentence stood originally 'while unmarried;' "and was altered to the present form of expression, on the application "of the pursuer, and that the alteration 'was made to please her.'

"Now, it appears to the Lord Ordinary that this was just the occasion "on which the defender, if he truly had rejected the pursuer's letter of "8th March, must have adhered to the expressions originally used. It

" adhere to the Lord Ordinary's interlocutor of " 7th March 1837, and refuse the desire of this note;

Statement.

" engagement, neither of which conditions it will be observed can be " possibly applicable to it, as explained by the defender.

" Such, then, being the letters, it only remains for the Lord Ordinary " to consider the evidence of the pursuer's father and sister, whose exami- " nation has been authorized by the Court in the special circumstances of " this case. It is needless to state that witnesses so circumstanced must " be presumed to have a strong bias, and that their testimony, if unsup- " ported, à fortiori contradicted, must be received with great hesitation. " The testimony of these witnesses, however, seems to stand clear of any " imputation on the score of appearance of partiality, and is in all its " essential particulars consistent with the inferences which the Lord " Ordinary has thought himself entitled to draw from the letters them- " selves. By the testimony of both these witnesses, it is clear that they " conceived and expressed that belief to the defender, that it was the " secrecy of the marriage and not the postponement of it, which they " understood to be his object in the letters. And it is equally clear, " according to their evidence, that that view was admitted or at least " acquiesced in by the defender. Upon the whole, then, the Lord Ordi- " nary has formed the opinion that the letters, combined with the parole " proof by the pursuer's father and sister, afford sufficient evidence of a " de presenti declaration of marriage.

" As to the remaining part of the parole proof, and the whole pro- " ceedings of the parties after the raising and abandonment of the decla- " rator of marriage, there seems to be a great difficulty in connecting " them with the correspondence hitherto considered. This arises from " the defect of the evidence of the conditions on which the action was " abandoned. The defender alleges that it was in consideration of his " becoming bound to grant the pursuer a pecuniary provision, while it is " averred by her on the other hand that she agreed to abandon the action " and give up the documents on which it was founded, solely in consider- " ation of his engaging to give her an absolute and unequivocal acknow- " ledgment of her status as his wife.

" As a mere question of probabilities, the Lord Ordinary has no hesi- " tation in avowing his belief of the latter statement. Even in the most " trivial question of pecuniary obligation, a party, a professional person, " who contrived to transact with his adversary, an inexperienced young " woman, under the cautious seclusion of her parents and legal advisers, " could not well complain of any unfavourable construction being put " on his conduct. But these unfavourable presumptions are incalcu- " lably stronger in the present case, where the defender must, from the " nature of his connexion with the pursuer, have had a great influence " over her, and where, having got her into his power, and having ob- " tained, through her means, possession of all the documents considered " to be of importance, he induced her to abandon, by her own unad- " vised act, that legal proceeding which she had commenced under the

Appellant.—The father and sister of the respondent were not, according to the law and practice of Scotland, admissible as witnesses in her behalf. The principle of the law of Scotland in regard to relations in the degree of father or mother is, that in respect of their presumed partiality they are not to be credited in questions of contract. There is plainly no case to which this principle can apply more strongly than a case of status. Penuria testium is not held to render the evidence of such witnesses admissible in questions of irregular marriage, more than in any other sorts of contract; this exception is recognized only in questions of age and propinquity, or in the trial of crimes.[1] It was incompetent to admit as evidence the statement made by the respondent to her agent, Mr. White, respecting her motives for demanding re-delivery of her documents from him. To render hearsay admissible at all to this

" ments she had every reason to believe that she was at the defender's " mercy. Neither is it to be thrown out of view, that there are some " other circumstances in these subsequent proceedings, which the defender " will find it difficult to explain. The taking of the house in Warriston " Crescent, and the intimation of it to the pursuer's mother, are not " very easily reconcilable with the notion of a mere continuance of an " illicit connexion. Inferences still more strong may be drawn from the " letter addressed to the pursuer's mother from South Queensferry, on " 22d April, on their way from Edinburgh, and also from the letter of " 1st May 1834, addressed by the defender to the pursuer in Glasgow.

" These letters are written with the defender's habitual caution; but " no person, on the mere reading of these letters, and in the ignorance " of any private views on his part, could for a moment suppose that " they implied anything but a legitimate connexion between him and " the party to whom the first of these letters related, and to whom the " second was actually addressed. But the Lord Ordinary finds it unne- " cessary to remark farther on the evidence of the proceedings of the " parties after they left Edinburgh. His opinion is formed on the " letters of the month of March, corroborated as they are by the tes- " timony of the two Craigies; and, for the reasons already given, that " opinion is in favour of the pursuer."

[1] Dalziel v. Richmond, 10th June 1790; Ball v. King, 21st January 1797; Stewart v. Menzies, 5th Feb. 1835; all in Fac. Coll.

regular and formal celebration in facie ecclesiæ has been disregarded.[1]

A promise of marriage has not been proved. This point must depend exclusively upon the construction of the appellant's letters, or rather of the antedated letter of the 25th January 1834, containing the alleged promise of which the subsequent letters are founded on as merely confirmatory. The promise contained in the letter of 25th January is, that "I shall, at "my decease, leave a declaration acknowledging you "as my lawful wife;" and is accompanied by an explicit intimation, that "the declaration shall only be delivered "at my decease, in the event of the most strict secrecy "being adhered to regarding this communication." Lord Stair defines marriage "to be the conjunction of "man and woman, to be consorts for all their life, "with a communication of rights, divine and human; "so the essence thereof consists in the conjugal society, "the special nature of which society appeareth by the "state, interest, and terms that the married persons "have thereby." The promise given by the appellant was of something exclusive of this essence of marriage, viz., a declaration not to be delivered till after his decease, by which the conjugal society could not be constituted.[2]

Supposing there was a promise of marriage, it was effectually recalled by the appellant before any subsequent copula took place between the parties.[3] The

[1] Jolly v. M'Neill, 20th June 1828, 3 Wilson and Shaw, 85.

[2] Stair, b. 1. tit. 4. s. 6.; Cockburn v. Logan, 19th July 1670, Mor. 12386, Smith, 26th Nov. 1755, Mor. 12393; Harvey v. Crawford, 19th Feb. 1732, Mor. 12388; Anderson v. Fullerton, 13th Nov. 1795, Mor. 12690.

[3] Stair, b. 1. tit. 4. s. 3.; Ersk. b. 1. tit. 4. s. 3.

penuria testium is most likely to exist in regard to them.[1] That the penury of testimony is the result of the tortuous act of the appellant is a circumstance of itself sufficient to authorize the testimony in question. But although the witnesses had been inadmissible the appellant waived the objection by himself cross examining them.[2] The conversation between the respondent and Mr. White formed part of the res gestæ, was explanatory of the conduct of the parties, and was therefore competent to be given in evidence.[3]

The letters amount to a de præsenti declaration of marriage, more especially when explained by the relative parole proof. The letters in March and April taken by themselves, amount to a de præsenti declaration. However cautiously they may be conceived, they were undoubtedly written and delivered by the defender to the pursuer as such. It is of no consequence what the characters were which the parties chose to employ in expressing their consent. If it be once made out what they intended to mean by the characters employed, effect will be given to the meaning and intention, rather than to the literal reading of the words. The respondent is quite ready to concede, in the

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[1] Stair, b. 4. tit. 43. s. 8.; Bankton, b. 4. tit. 30. s. 15.; Ersk. b. 4. tit. 2. s. 26.; Barber v. Stewart, July 1732, Mor. 16742; Young v. Arrot, 8th Dec. 1738, Mor. 16743; Stirling v. Hamilton, 11th July 1704, Mor. 16708, and 13th July 1706; Cumming v. Cumming, 5th March 1748, Mor. 16756; Boyd v. Gibb, 20th Jan. 1770, Mor. 3989 and 9583; Nicolson v. Nicolson, 6th Dec. 1770, Mor. 16770, and Hailes, Dec. 371–418; Martin v. Mackissan, 8th Feb. 1816; Bell v. Bell, 14th April 1819, 2 Murray 130; Spence v. Howden, 12th July 1819, 2 Murray, 167; Stewart v. Menzies, ut supra.

[2] Corporation of Sutton Coldfield, 1 Vern. 254; Bland, 3 Bro. P. C. 620.

[3] Starkie's Law of Evidence, 2d edit. vol. i. p. 36.

marriage which the letters declare, can the repeated admissions or acknowledgments of the appellant, that the respondent was his "wife," be ascribed? In what other capacity can their cohabitation be viewed than that of marriage? Were there any doubt about the terms of the letters, or about the meaning which the parties conveyed to each other by the letters, it would be removed by what followed on them. Every word the appellant spoke, or deed the appellant did, carried to the respondent a confirmation of the acknowledgment contained, or which she believed, and which the appellant knew she believed, to be contained, in the letters. It was the evincing to her, as well as to others, the consent of marriage, which made the contract.[1]

There was no discharge or renunciation of the promise. The appellant possessed himself of the letters surreptitiously, and against the will or consent of the respondent, and it is impossible to hold that that amounted to a discharge or renunciation of the previous promise or obligation of marriage. But the parties slept together on the night of the 22d, and it was not till the 23d that the appellant got possession of the documents in the manner described. A marriage by promise and copula had therefore been effectually constituted before the appellant possessed himself of the letters; and it was beyond the power of either of the parties to recall it. It was indissoluble, except by death or divorce; and even although the respondent had voluntarily renounced the promise, her renunciation

[1] M'Adam v. M'Adam, 21st May 1813, 1 Dow, 189; Honyman v. Honyman, 3d March 1831, 5 W. & S. 133, 139, 144; Stewart v. Menzies, 6th Dec. 1833, 12 S. & D. 183.

although one of the parties should not consider himself or herself married.[1] The case of M'Dowall[2], was entirely different in its circumstances from the present. The promise there given was not absolute, but qualified. It was made to induce the woman to submit to the man's embraces; and the promise was, that he would marry her if she fell with child. The Court held this not a promise subsequente copula, but a promise post copulam. The woman might not have conceived, and in that case no promise had been given. It was only when pregnancy took place that the promise came into existence, and there it remained unconsummated and unfulfilled.

Respondent's Argument.

The parties were habit and repute husband and wife, and cohabited together as married persons.

LORD CHANCELLOR.—My Lords, in this case the Lord Ordinary, and all the judges of the Inner House, concurred in the opinion that there had been a valid marriage between the parties, although there was a difference of opinion as to whether it was to be considered as resting upon a contract per verba de presenti, or a promise of marriage copula subsequenti. It appears to me impossible for the appellant to escape from one or the other of these grounds; as to the first, it is not necessary to prove the contract itself, it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place; upon this principle the acknowledgment of the

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[1] Pennycuick, 15th Dec. 1752; Shillinglaw v. M'Intosh, 6th March 1829, 7 S. & D. 533; M'Kinnon v. Sandys; and Myles v. Sim, 20th Nov. 1829, 8 S. & D. 89.

[2] Ante, p. 960.

latter supposition. The letter dated the 25th of January but written on the 8th of March, (an ante-dating strongly corroborative of the respondent's case, but unexplained by that of the appellant,) states the writer's intention of providing for the respondent, by an annuity payable from the widows fund of the Writers to the Signet, which he could not do unless she were his wife. He wished, indeed, that the declaration, acknowledging her as such, should not be made known until after his decease, but such declaration would have been wholly inoperative, unless there had been a marriage in his lifetime; a declaration of marriage made known at that time, he says, would be his ruin, which is quite consistent with a previous secret contract, but is absurd, as addressed to a woman pressing for marriage not previously contracted. If it is to be construed to mean "I will never marry you, but after my death you shall "have a declaration which may enable you by fraud to "obtain an annuity as my widow," would it not have been absurd in the circumstances to permit her to shew it to her parents? but if, as between themselves, it was a recognition of the respondent as the wife of the writer, it would naturally tend to relieve their anxiety, although the announcement of the marriage was refused.

Again, if the letter was felt by the writer to be a recognition of the marriage, his prohibition to make it known to any other person or persons is intelligible; but if it was only to announce an intended fraud against the widows fund after his own death, by the publication of which the respondent alone would suffer, the concealment might safely have been left to her. The

used in the letter of 29th March calculated to throw any doubt upon it, the appellant wrote another letter, of the 1st of April, in which he says, "I hereby declare "most solemnly, before Almighty God, that I never "granted a letter to any one such as I have given to "you, and cannot now grant any letter with such an "obligation to any other person, as I consider myself "bound by my letter." The appellant attempts to escape from the effect of this letter, by suggesting that it was only to satisfy the respondent about her annuity; there is not an expression in it consistent with such a construction; on the contrary, being written to a woman who he knew claimed to be his wife, and relied upon his former letter as a recognition of her marriage, that letter can receive but one construction, namely, that she might rely upon that letter for that purpose, and that he was himself bound by it.

Upon the evidence of those letters, therefore, without referring to any parts of the testimony upon which doubts have been raised, I think the case made out, of a written recognition of the respondent, by the appellant, as his wife, and admission of a previous contract of marriage having taken place between them. Whatever difficulty there may be as to the evidence of what took place when the respondent obtained the papers from Mr. White, or what took place at Queensferry on the 22d of April; the appellant's letter to the respondent's mother of that date, seems to me to make such evidence comparatively immaterial. The respondent had determined to institute a declarator of marriage against the appellant, with the concurrence of her parents. This proceeding she withdrew, and left

made known would be the utter ruin of the appellant? What was the fact which it would be necessary to make known within three months to the collector of the widows fund? What was to be made known to the respondent's parents, and in what way was the letter to be used as a document against him? Those expressions have all a natural meaning if a marriage was the subject to which they refer, but are wholly inconsistent with the appellant's construction that a plan of defrauding the widows fund was the only subject to which they referred.

The letter of the 1st of April puts this beyond all doubt. What was the obligation referred to in that letter, which after the letter of the 25th of January the appellant would not grant to any other person, and by which he considered himself bound? What but marriage? I think that those letters do recognize a previous contract of marriage, but if not, they clearly contain a promise of giving to the respondent the character of wife, which, followed by the cohabitation of the 22d of April, constitutes a marriage.

Question as to the application of the rule of law, in reference to promise subsequente copula, in cases in which cohabitation has also preceded the promise.

It has, however, been contended upon this latter view of the case that the above rule of law does not apply in cases in which cohabitation has also preceded the promise; some authority has been referred to in support of that proposition, particularly White v. Hepburn, 18th November 1785[1], Mor. 12,666, and the case of M'Dowall, in February 1800[2], Ferguson's Consistorial Law (1829) pages 167 to 178; but in the

[1] White v. Hepburn, 18th November 1785.
[2] M'Dowall, February 1800.

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latter case the promise appears to have been conditional upon the woman proving with child; and a contrary doctrine has been recognized in Shillinglaw v. M'Intosh, 6th March 1829[1], 7 Shaw & Dunlop, 533; M'Kinnon v. Sandys[2]; and Myles v. Sim, 20th November 1829[3], 8 Shaw & Dunlop, 89. In the view I take of this case it is not necessary to express any conclusive opinion upon this point. It has been further contended that if there had been any promise it was released by giving up the letter which contained it before any copula took place; the evidence proves the contrary, the copula having taken place on the 22d of April, and the possession of the letter by the appellant not having then taken place; even had this been otherwise it would have been necessary for the appellant to have proved the voluntary delivery of the letter to him by the respondent for the purpose, and with the intent of releasing the contract, which he has wholly failed in doing.

Finding sufficient in this case to support the judgment of the Court of Session without relying upon that part of the evidence which has been objected to, there is no necessity for saying much upon that point. If the ground of the rule of law in Scotland as to rejecting the evidence of near relations be the same as that upon which the rejection of the evidence of a husband and wife in this country rests, namely, the avoiding that invasion of domestic confidence which the admissibility of such evidence would occasion,—there may

[1] Shillinglaw v. M'Intosh, 6th March 1829.
[2] M'Kinnon v. Sandys.
[3] Myles v. Sim, 20th Nov. 1829.

be reason in considering a penuria of other evidence as an exception to the rule; but if it be founded upon the supposed want of credit of such near relations, it seems most unreasonable to reject such testimony, when its credit may be fairly tested by other evidence to the same point, and to receive it only when, there being no other evidence, the conclusion must be drawn from such evidence only. There is, however, no doubt of the rule and of the exception, and there cannot be a case more clearly falling within the exception; for not only is this a case of domestic transaction likely to be known only to members of the family, but the evidence of the father and sister become material in a great measure from the secrecy maintained at the instance of the appellant himself, and from the spoliation by him of written documents; the admissibility of the evidence, under such circumstances, appears to be established by the authorities referred to by the respondent.

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The evidence of White, as to what the respondent said to him upon applying for the paper, does not appear to me to be at all material in coming to a conclusion upon the merits of the case. For these reasons I think that the interlocutors appealed from are right, and therefore move your Lordships that they be affirmed with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. I had no doubt respecting this case from the beginning, as I intimated during the argument at the bar, though I pressed the counsel for the respondent on several points for the purpose of having it fully argued. My opinion has

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doctrine that even if it had been proved that the promise had been renounced between the contract and the copula, there would not be sufficient to sustain the marriage, because I am inclined to think the sounder view is, that though the renunciation might bar an action for breach of promise of marriage,—if the copula took place after renunciation, the copula would revive the promise and repeal the renunciation. Where the copula takes place subsequently to the promise it is taken to be in execution of the previous promise.

It is unnecessary to enter into the other questions which have been discussed by my noble and learned friend, with whom I entirely agree. The letter of April, connected with the letter of the 25th of January, can bear no other construction than that which he has given them. One part of the case entirely fails, namely, that which relates to the supposition of an attempted fraud on the widows fund. I think a very slight attention to the case sufficient to shew that the facts do not bear out that allegation in the smallest degree, but that the facts are most consistent with the case made by the respondent. My Lords, without entering further into the reasons, or discussing the argument used at the bar or in the court below, I am of opinion, with my noble and learned friend, that the interlocutors must be affirmed, and of course with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the

[*26th August* 1839.]

(Appeal from the Court of Session, Scotland.)

ARCHIBALD HORNE, Judicial Factor, on Cromarty, and COLIN M'KENZIE of Newhall, Appellants.[1] (No. 37.)

[*Sir F. Pollock—Pemberton.*]

The Honourable Mrs. MARIA HAY MACKENZIE of Cromarty and Captain HUGH MUNRO, her Tacksman, Respondents.

[*Attorney General (Campbell)—Buchanan.*]

Salmon Fishing — Statutes 1424, *c.* 11, *&c.— Stake Nets— Evidence.*—At the trial of an issue as to whether certain stake nets and other engines were placed in situations prohibited by the statutes regulating the salmon fisheries, the judge in the course of his direction to the jury, after defining estuaries as spaces between the strictly proper river and the strictly proper sea, the waters of which were partly salt and partly fresh, proceeded thus:— "The mere name is of little importance. The thing to "be looked to is the fact of the absence or of the preva- "lence of the fresh water, though strongly impregnated "by salt. Now, where this fresh water prevails, though "in the estuary, these structures are illegal." The Court of Session disallowed a bill of exceptions to the

[1] Rep. 16 D., B., & M., 1286.

"salmond, grilsis, and trowtes, quhilk are destroyed by "cowpes, narrow messes, nettes, prynes, set in rivers "that hes course to the sea, within the flude mark of "the sea, it is advised in this instant parliament, that "all sic cowpes and prynes be destroyed and put away "for three ziers."

Another statute, in the reign of James IV., 1488, c. 13., enacts,—"It is statute and ordained, that "all cruffis and fisch-dammys that ar within salt "watyrs quhar the sey ebbs and flows, be utterly de-"stroyed and put down, alswell thai belongis to our "soveregn lord, as utheris throw all the realme. And "as anent the cruiffis in fresche waters, that they be of "sic largnes and sic days keepit as is containit in the "actis and statutis maid thereupon of befor."

Another statute, in the reign of Queen Mary, 1563, c. 3., ratifies the preceding statute, with the following addition:—"That is to say, that all cruives and yairs "that ar set of late upon saunds and schauldes far "within the water where they were not of before, that "they be incontinent, tane doun, and be put away, "and the remanent cruives that ar set and put upon "the water sandis to stand still quhil the first day "of October next to cum, and incontinent after the "said first day to be destroyed and put away for "ever."

In 1828 the respondent, as proprietrix of salmon fishings in the river Conon, and her tacksman, Captain Hugh Munro of Teaninich, applied to the Court of Session, by bill of suspension and interdict, against several proprietors of fishings situated to the eastward of her fishings, on the ground, that they were fishing

"thereof, by means of stake nets, bag nets, yairs, "or other engines, placed in situations prohibited by "statute?"

The affirmative of the issue was with the respondents, the pursuers of the action. In the course of the trial a witness for the respondents, who had been employed to make a survey of the subjects in dispute, proposed to refer to a printed paper purporting to be a report of his survey, and containing also certain manuscript jottings on the margin. This was objected to by the appellants, but the objection was over-ruled, and the examination proceeded.

After a variety of evidence adduced by both parties, the judge directed the jury in point of law, and a verdict was returned for the respondents.

The above ruling of the judge in respect to the evidence, and certain parts of his direction to the jury in point of law, were then made the subject of a bill of exceptions.

The first ground of exception was thus set forth in the bill:—"The counsel learned in the law for the "said defenders did object to the witness having before "him a printed paper, while giving his testimony. And "the witness being examined as to the said printed "paper, deponed, that it was a copy of a report which "he had made to the pursuers on their employment, "and on the margin of which he had, two days ago, "made a few jottings. The witness stated that he had "his original note-book with him, and these jottings "are not in it, though their materials are. He could, "with a little time, repeat the calculations of which "these jottings consist, but he happened to make them,

" It may naturally occur to you as odd, that a ques-
" tion so much involved in law should be put to you.
" But it was unavoidable. Because, though a Court
" may give the legal rule, which permits or condemns
" these machines, according to circumstances, the deter-
" mination of the circumstances, that is, of the facts, to
" which the rule is to be applied, is the proper province
" of a jury. I shall therefore begin by giving you as
" much of the law as is necessary, and shall then leave
" you, with such observations as may appear to me to
" be proper, to apply this law to what you shall think
" the true import of the evidence.

" I say as much as is necessary: for it is not neces-
" sary, for the determination of this particular case, that
" I should give, or attempt to give you, a catalogue or
" a description of all the circumstances, even of situ-
" ation, under which stake-nets may be lawful, or the
" reverse. Many of them have no application to this
" case; and it is needless to encumber ourselves with
" legal matter that is superfluous. Nor shall I trouble
" you by any observations either on the history or on
" the policy of the law. These may be useful to law-
" yers, by assisting them to put the right construction
" on disputed statutes; but they are of little or no use
" after the construction of these statutes is fixed, and
" least of all to juries, who, without any reasoning on
" the subject, must take the law as they receive it from
" the Court.

" Now I have to lay it down to you, in the first
" place, that the statutes, as explained by decisions,
" make these machines unlawful, if they be placed in
" what is usually known as a river in the ordinary sense
" of this word. You have heard enough in this case to

" where this fresh water prevails, though in the estuary, " these structures are illegal; and they are not only " unlawful (meaning always within the ebbing and " flowing of the tide) when placed in the channel of the " estuary that is always covered with water, but they " are so also if they be placed on the sands which are " left dry by the ebbing of the sea.

" In these two situations, viz. in the river, or in " its land-locked estuary, the contrivances are illegal. " There are two situations of a different description in " which they are lawful.

" For, in the third place, some rivers terminate with- " out passing through any frith or estuary, and are lost " in the open ocean almost so soon as they touch the " salt water. In this case stake-nets are not prohibited, " if they be placed away from the immediate mouth of " the river, though situated where the sea ebbs and " flows. The ebbing and flowing wont of itself render " them unlawful, because they may be within the sphere " of this phenomenon, and yet in the pure and un- " doubted sea.

" In the fourth place, there are examples in which " the junction of the fresh water and the salt does not " take place, as in the case last put, at the edge of the " open ocean, but far up in the land, where the river " loses itself in arms, or in bays of the sea. These " portions of the ocean become what are called arms of " the sea, merely because they happen to be enclosed " within ridges, which guide their waters into the in- " terior. But this circumstance does not make these " arms identical with estuaries. They are the sea. And " being so, these machines, if placed in or on arms of

" not river, or the continuation of a river through its " estuary."

This direction was excepted to, in the first place, as being in itself erroneous; and secondly, in respect the judge " did not direct the jury, that the prohibitions of " the statutes could not extend lower down than to the " point where the fresh water of the river joined the " salt water of the sea at low ebb tide."

The Lords of the First Division, having heard parties upon the bill of exceptions, ordered cases, and thereafter pronounced the following interlocutor:—" 21st Dec. " 1837.—The Lords direct the cause to be laid before " the judges of the other division of the Court and the " Lords Ordinary, for their opinions upon both the " grounds of exception contained in this bill of excep- " tions, and with that view appoint the parties to put " into the boxes of the said judges printed copies of " said bill of exceptions, record, and cases for the " parties, together with the plan of Mr. Buchanan, and " that quam primum."

The consulted judges thereafter returned in writing the opinions, which are subjoined.[1]

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[1] OPINIONS signed by Lords Justice Clerk (Boyle), Glenlee, Meadowbank, Medwyn, Fullerton, Jeffrey, and Cuninghame.

" We are of opinion, that the first ground of exception, touching the " evidence of Mr. Buchanan the engineer, cannot be sustained; and that " the bill, so far as rested on this ground, should therefore be disallowed.

" As to mere calculations, or statements of averages or general results, " we are clearly of opinion that these might with perfect propriety have " been read from or referred to by the witness, though made out imme- " diately before his examination. If not so made out indeed they " probably must have been framed and reduced to writing while the " examination was going on, to the great delay and embarrassment of the " proceedings.

" With regard again to matters of fact and observation, it is admitted " that the original notes made at the time might have been competently " referred to; and the witness swore distinctly, that the report, to which

advising upon these opinions, the following judgment

" more difficulty; but, on the fullest consideration, we have come to " the opinion, that the defenders have failed on this point of the case also, " and that the bill ought therefore to be disallowed in toto.

" If we were satisfied, indeed, as the defenders have contended, that the " true import of the whole direction in point of law was, that wherever a " river terminated in an estuary the only thing to be looked to, in deter- " mining whether stake-nets placed in such estuary were legal or illegal, " was, whether there was a preponderance of salt or of fresh water at the " place, we should certainly have had great difficulty in finding this to be a " correct exposition of the law. But we think it manifest, that such is " not the import of the direction; and that it never can be supposed that " the jury took this to be its meaning.

" In the first place, there is nothing whatever in the passage referred " to, as to the comparative prevalence or predominance of salt or of fresh " water in a river estuary, affording the only true criterion of the legality " or illegality of stake nets in such a situation. What the judge says is to " be looked to is, the absence or prevalence of the fresh water only. We " think it quite impossible to hold, that prevalence here means presence " only; especially when such a substitution would make the direction " more questionable than as it stands. The word prevalence, in fact, is " too plain to admit of interpretation; and the judge told the court in " consultation, that he meant it in its natural and plain sense, as equiva- " lent to predominance.

" Now, even if we could hold (as we certainly do not) that this single " passage contained the only direction in law which the judge gave to the " jury, and that it could not be qualified or explained by what went " before or came after, we are not prepared to say that it would have been " absolutely unsound or erroneous. It was confessedly applied only to " the case of a river terminating in an estuary, intra fauces terræ; and is " supposed to have been given as a criterion for judging whether that " estuary was sea or river, in the sense of the laws about salmon fishings. " Now if, in such an estuary, there is absolutely no sensible admixture of " fresh water whatever, when the tides are ebbing and flowing (and it " is plain that this is the only thing that could be meant by the absence of " fresh water), we can scarcely conceive a more decided proof that an " estuary of such a description could not be considered as a river, in the " sense of the laws referred to. On the other hand, if, during the ebbing " and flowing of the tides, and in the average condition of the waters, " the fresh water actually predominates, or forms more than a half of the " whole, it seems almost as difficult to hold that such an estuary could " ever be regarded as the sea, or an arm or branch of the sea.

" But the substantial ground on which we have come to think that this " exception must be disallowed, is, that this part of the direction must " clearly be taken along with all that relates to the same matter in the " context; and that, when so taken, it is quite plain that the absence or " prevalence of the fresh water is not meant to be held as the only thing

" 10th July 1838. The Lords disallow the bill of " exceptions, but find no expenses due."[1]

" 'and (3) the other circumstances, shall satisfy a jury, that on the " 'whole the space is river, including in this term its estuary; and on " 'the other hand, the sea does not lose its privileges merely because a " 'river flows into it, or flows through one of its arms or bays, where the " 'tide ebbs and flows, provided (1) the relative smallness of the stream, " 'and (2) the other circumstances, shall satisfy a jury, that on the whole " 'the space is sea, and not river, or the continuation of a river through " 'its estuary.'

" After this, it seems to us impossible to doubt that, when it was pre- " viously said that 'the thing to be looked to' was the absence or " prevalence of fresh water, it was only meant, and must have been under- " stood by all who heard the direction to the end, that it was 'the great " 'or principal thing,' but to be taken into view along with all the " other circumstances; not, in short, a legal or exclusive criterion, but " merely a very important element in judging of the complex question of " river, estuary, or sea. It is to be observed, that it is not said, even in the " previous passage, to be the only thing to be looked to, but simply that it " is the thing—a form of expression quite common for signifying the " chief thing; as, when it is said that the thing to be looked to in a " witness is veracity, or in a lawyer skill or learning; these expressions " certainly could never be conceived to imply, that intelligence or exact " memory was of no consequence in the former, or honour or honesty in " the other. If the passage therefore stood unexplained by any other we " should think that this was its fair meaning; but when the whole " direction is resumed and summed up, in the anxious and accurate " words which we have cited, we think there is not even a pretext for " saying, that there could be any doubt or mistake about the matter.

" We are also very clearly of opinion, that the law as suggested in the " bill of exceptions is not that which it was the duty of the judge to state " to the jury as applicable to the case before them.

Lords Moncreiff and Cockburn added the following concurrence in the foregoing opinion.

Lord Moncreiff.—" I entirely concur in the first part of the above " opinion.

" I also concur in the second part of it, but with the following explana- " tion: Taking the charge as an entire whole, and looking to the sub- " stance and result of it, I think that it amounts to this, that in this " question the estuary of a river is to be considered as a part of the river; " that stake-nets placed in such an estuary are illegal; and that the ques-

[1] Further OPINIONS at advising (30th June 1838), by Judges of First Division:—

Lord President.—Two points were raised on this bill of exceptions: (1.) one in regard to Buchanan's evidence; in regard to it we all agree; but

Appellants.—(1st exception.) Although the appellants admit that Mr. Buchanan was entitled to refresh

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meaning to be, that in using the expression "prevalence" of fresh water he meant by it predominance, I agree in the main with him; but if he had meant, as I understood it from the charge, to be mere presence of fresh water, I certainly could never agree, because in that way any body of salt water must be held to be a river, if the presence of any portion of fresh water could be detected. We could not stop short after that, and refuse to call the Frith of Forth a river; and indeed in that way the Mediterranean would become a river, or estuary of the Nile.

Lord Mackenzie.—On the whole, I am inclined to adhere to the opinions delivered.

Lord President.—I have gone over the whole of the statutes referred to. Some of them talk of salt waters, and others of waters, and fresh water that ebbs and flows, and so much confusion prevails in the mode of expression, that it is exceedingly difficult to make sense of any one act.

Lord Corehouse.—I certainly agree with the opinions of the consulted judges, but under the explanation given by Lord Moncreiff. It did not appear to me that it would be just to set aside the verdict of the jury because the charge referred to the prevalence of fresh water, as I did not consider that the prevalence of salt or fresh water was the chief circumstance to be regarded, and I don't think that this was decided in the Tay or other cases. There were other matters in the charge, on which the jury may have proceeded. Therefore, with the caution contained in the charge, I am inclined to hold that we cannot allow the exception to the law; for I consider the law in the charge to have been properly ruled, and it appears to me that the charge is exceedingly well expressed, and I agree that it was a most fitting question for a jury.

Lord Mackenzie.—I concur with what has just been expressed by Lord Corehouse; and I ought to have said previously, that it is entirely under the explanation given by Lord Moncreiff that I coincide in the opinions of the other judges. I think the explanation of Lord Moncreiff is very necessary.

Dean of Faculty moved for expenses.

Lord Gillies.—This has been a question of very great difficulty indeed. So I do not see why you should get your expenses. It is not the ordinary case where you would be entitled to expenses. Indeed, I consider that the result is contrary, not only to justice, but it is contrary to common sense, to make a river of the Cromarty Frith.

Lord Mackenzie.—I certainly am against allowing expenses, for it was a question attended with great difficulty.

Lord Corehouse.—I should rather be inclined to give expenses. There was a very ingenious argument by Mr. Solicitor General, but I think after the decision in the Tay case it was clearly made out to my mind that the law in the charge was well laid down by the presiding judge. So I think expenses should be given, and that too where the judges are so unanimous.

vestige of evidence to show that either the manuscript or the print had been compared with the original or with each other. What apology was there for Mr. Buchanan reading from a document, which, as regards authenticity, was utterly worthless, more especially as it must be presumed that the best evidence, viz. the field-books and original notes, were within his reach? The very circumstance that the report contains a detail of many observations and many results in numbers, is one of the strongest reasons that can be urged for the strictest enforcement of all the rules as to authentication. It cannot be supposed that Mr. Buchanan could carry in his memory all those numerical results, and it was therefore impossible for him to check the accuracy of the copy. Blunders might pass unnoticed, and he might give in evidence with the utmost bona fides, on the strength of the printed report, results and observations totally at variance with the truth. It would be dangerous in the extreme to put testimony in jeopardy by such laxity of procedure. Even supposing the report had been duly authenticated, it cannot be regarded otherwise than a plan, a book, or a deed, and ought to have been produced eight days before the trial.[1] In this way it might be made evidence, but it would be both unwarrantable and inexpedient to allow a witness to give his testimony from what ought (if admissible at all) to have been treated as documentary evidence. It gives him an advantage which no witness whatever is entitled to claim. The ordinary rules of evidence afford the strongest analogy on this subject. There is no rule in practice better settled, than that secondary evidence will not be admitted, where the best may be obtained. And

[1] Act of Sederunt, 29th Nov. 1825, s. 29.

valence of fresh water, although neither the term nor definition used are to be found in any of the enactments on the subject. The question is not within what locality is there the presence, the prevalence, or the absence of fresh water; but the question is, what is meant by the term aquæ, as distinguished from the term mare, i. e. what is the aqua within which the sea ascendit et se retrahit. The meaning of the term has been established, by a totally different criterion from that given by the learned judge, by our standard institutional writers.[1] But not only so; in the Don case[1], the Lord Chancellor, in reviewing the salmon fishing statutes, comes to the following conclusion:—"Taking "the latter acts in connexion with the earlier acts, and "the whole subject together, construing one with the "other, I think I am justified in recommending to "your Lordships to come to the conclusion that the "whole body of the acts, taken together, refer not to "the sea coast, but to rivers and to continuations of "rivers. And therefore I should recommend to your "Lordships to confirm the judgment of the Court, as "far as relates to the construction of those acts of parliament."

That the term aquæ denominates the river can therefore no longer be disputed. But it also includes the continuation of the river; and what is the continuation of the river, as distinguished from the river, but that part of the river which continues to flow after the sea has receded from it. This definition corresponds precisely with the term ostium fluminis, which, in the Spey case (as stated by Lord Kames)[1], this House judged to

[1] Post, p. 1017.

at low ebb. Their natural instinct seems to lead them to select the deep water at that point, because they are more secure from interruption or disturbance, occasioned by the ripple arising from the constant flux and reflux of the tide. Experience and observation would shew to the early Scottish legislators that yairs or other stationary engines could not obstruct the descent of the fry below the line of low ebb tide.

Looking to the declared object as well as to the express provisions of the statute, — to the habits of the salmon as well as to the leading features connected with the flux and reflux of the tide,—that no line can be pointed out, the boundaries of which quadrate so nearly with the enactment, as that contended for by the appellants. Below the line of low ebb tide the sea never recedes. It never withdraws itself. It constantly occupies and holds possession of that space Above that point the contending influence of the river becomes apparent. There is a periodical balance between the force of the ascending tide and that of the descending fresh water stream, which maintains the river in a state of comparative quietude, certainly favourable to the motion of the fry, "ascendendo et descendendo "ubique." Within that locality it may be said that the fishings are in aquis ubi ascendit mare et se retrahit; and it may be said, with equal truth and accuracy, that they are situated ubi salmunculi vel smolti ascendunt et descendunt; and where such fry and smolts, when they approach the sides, would be interrupted in their course and destroyed.

Much reliance seemed to be placed by the respondent on the statute of James IV., 1448, c. 13.[1] The parti-

[1] Ante, p. 979.

satisfied that these words are used in contradistinction to each other. They cannot be read as implying the same thing, without involving an absurdity. To say that cruives and fish dams are prohibited in the sea where the sea ebbs and flows, is ludicrous; for it is the characteristic of all sea, that it is always in a state of ebb or flow. It is clear, therefore, that the term "salt "waters" was employed to denote something different from the sea; and it is equally clear that this prohibition cannot extend below the line of low ebb-tide; because the engines here denounced cannot, from the very nature of their construction, be erected below it.

The Tay case [1] proceeds on specialties. One important specialty is, that it went entirely upon the terms of the statute 1581, c. 15., which, in appointing conservators for the protection of the fishings, fixed the limits within which this protection was to extend. Another important specialty was the fact of the bar of the river being below the Drumly Sands; whereas, in the present case, there is no bar or alluvial deposit below the town of Dingwall. The non-existence of yairs in the Tay was also strongly relied on. The extent therefore to which fishing by yairs has been carried in the Frith of Cromarty, while it demonstrates the general understanding in favour o. their legality in these localities, serves to distinguish it from the case of the Tay in one of its most important features. The last but not the least important of these specialties is rested on the title deeds of the several proprietors. If the Court had not been satisfied as to the position of "the natural bar of the river," and if there had not been before them any evidence of the existence

[1] Post, p. 1017.

had got no such explanation; and who can tell what construction they had put upon the expressions?

(2d branch.)— If the interpretation of the statutes above contended for be the true one, it follows of course that the learned judge should have directed the jury that the prohibitions of the statute could not extend lower than the confluence of the river with the sea at low ebb tide.

Appellants Argument.

Respondents. — (1st exception.) The objection to Mr. Buchanan's examination clearly rests upon an attempt to confound the different objects and purposes for which a witness may refer to a manuscript. Reference to manuscript to enable a witness to speak correctly as to facts, is altogether different from the object and purpose Mr. Buchanan had in view, and hence the authorities referred to on the other side do not apply. Measurements, soundings, &c., are not occurrences or facts as to which a witness is to speak from recollection. Whether the witness saw strata or rocks of a particular character in the course of his survey, whether he found sea-weed or marine plants, &c., in different parts of the frith, these may be matters of fact as to which he is either to speak from recollection or from notes made at the time. But measurements, soundings, analyses of water, &c., are not matters of recollection at all. They are the witness's experiments, and if the witness has before him that which he depones to be the record of such experiments, it is not for the purpose of refreshing his recollection that he refers to the paper, but of enabling him to report to the Court the experiment made by the witness, and which the court and jury could not see made.

Respondents Argument.

the truth of his statement, and he knows the accuracy of his report. He may have erred in his calculations when he made them on the field,—he may have erred when he checked them in his closet. But this is nothing more than an observation on his accuracy, which it is quite open to make to the jury, or in the motion for a new trial, but is wholly unavailing as matter of legal exception.

(2d exception.)—The Spey case[1] has no bearing whatever upon the present discussion; the question there was not as to the interpretation of the statutes, but as to the meaning of a term used to denote the boundary of certain fishings in a river by private grant. Assuming that the term "ostium fluminis" was rightly defined in that case, it merely denotes the termination of the river proper; there is an expanse of water between the proper river and the sea; i. e. between the ostium fluminis and the sea proper, which is also part of the forbidden territory. It may be true, as has been stated, that in the Don case[1] this expanse of water has been denominated the continuation of the river; but it does not on that account follow, that it is not distinguishable from the river proper. So far as that case went the question was just as open as before, what is and what is not the continuation of the river. The words used in the statute are, not "in rivers," but "in "aquis." This is something different from the river proper, and the defenders are right in saying that it was fixed in the Don case[1] to be something different from the sea proper. It is in waters where the sea ascends and draws itself back. Surely this does not mean the point of low water ebb. It means in waters where the sea is filling and ebbing. There must be river, and

[1] Post, p. 1017.

of modern science, not known or capable of being acted on in a comparatively rude age, when the statutes on this subject were passed; and it would lead to results of a most startling description, as applicable to various rivers,—results for which no reason either in law or sound policy can be assigned.

The general position contended for by the appellants, was expressly and solemnly overruled in the Tay case.[1] It was so completely overruled, that the Court, finding that there was no exclusive test, were obliged as a jury to enter into consideration of the whole circumstances of the case, and to fix the boundaries as to that frith, within which the stake-nets were illegal. That case has been regarded ever since in Scotland as a leading case on this subject. The same rule was followed in the case of the Clyde in 1813[1] — of the South Esk[1] — of the Beauly[1] and the Dornoch[1] in 1817 and 1818,—and then followed the Don[1] case, in which it was held that stake-nets were not illegal in the sea proper, as contrasted with rivers, friths, or estuaries, or continuations of rivers. The whole train of decisions, therefore, has conclusively fixed that stake-nets, although legal in the sea, are unlawful in rivers or estuaries; and whether any particular place is to be held as forming part of a river or frith, estuary, or continuation of a river, on the one hand,—or part of the sea proper on the other,—is a question depending on a variety of circumstances connected with the locality, which question is fitted for the determination of a jury. It has been ruled over and over again, that there is no fixed and absolute criterion which in law determines whether the place be a prohibited place or not, and it

[1] Post, p. 1017.

been directly at variance with the established law of Scotland.

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Ld. Chancellor's Speech, 16th April 1839.

LORD CHANCELLOR.—My Lords, this case seems to be one of very considerable importance, both as to the question upon the evidence, and upon the merits.

As to the point of evidence, this case lays down a rule which will have the effect of securing a uniform practice, in the course of proceeding in the courts of Scotland, similar to that which prevails in the courts in this country. The results of this case however do not depend upon this rule.

With respect to the principle which has been discussed in reference to the main question, it is one of very considerable importance, and the property in these salmon-fisheries is of very considerable magnitude. I cannot but think that a great deal of difficulty has arisen from the introduction of terms very difficult of definition, nowhere to be found in the statute. Arguments are used, and discussions take place, upon the meaning of the word "estuary," and even upon what is the meaning of the word "river;" and neither of these words is to be found in the statutes. The matter of law involved is neither more nor less than the construction to be put upon the statutes; and to that extent the party had a right to have the opinion of the learned judge. Whether the particular water in question in the particular suit does or not come within the definition, (if any definition can be found,) is matter very properly within the province of the jury.

The first question will be, whether your Lordships can, by any reasonable rule of construction, drawn from the statutes themselves, at once ascertain whether the

The issue was: "Whether the defender, or his pre- "decessors in office, has or have wrongfully fished for "salmon in the Frith of Cromarty, opposite to the "lands and estate of Cromarty and others, during the "years 1824, 1825, 1826, 1827, and 1828, or during "any part thereof, by means of stake-nets, bag-nets, "yairs, or other engines, placed in situations prohibited "by statute."

These latter words comprehend the whole question; viz., what are the situations prohibited by statute? If it was the duty of the House to lay down a rule upon this subject, and to prescribe the principles upon which this question ought to be tried, it would be necessary to consider carefully, not only the words of the statute, but the various decisions which have taken place. That, however, is not, at this stage of the cause, the duty of this House, nor would it be proper to do so. All that this House has to consider is, whether the rule, as laid down to the jury by the learned judge, was correct.

That learned judge, after mentioning that estuaries were spaces intermediate between the strictly proper river and the strictly proper sea, and that they were partly fresh and partly salt, stated that the structures in question were unlawful in those estuaries, and then proceeded thus: "The thing to be looked to is the fact of "the absence or of the prevalence of the fresh water, "though strongly impregnated by salt. Now, where "this fresh water prevails, though in the estuary, these "structures are illegal."

The learned judge, when the case came before the court upon the bill of exceptions, stated, that by the word "prevails," he meant "predominates;" but the question is, not what he intended, but what the terms

word presence had been used instead of the word prevalence, the court would have held the direction to be erroneous, as, beyond all doubt, it would have been. But the judges seem to have been influenced by the explanation of the term used by the learned judge who directed the jury, as if the question were, whether the judge was right in his view of the law, instead of being, what it really and solely is, whether the direction was in terms calculated to lead the jury to a right understanding of the law. I have no doubt but that the jury understood the word prevalence to mean presence, and that, so understood, the direction was erroneous. Let it, however, be assumed that it means predominance, I think it scarcely less erroneous.

The consulted judges say, that if they were satisfied that the true import of the whole direction, in point of law, was, that the only thing to be looked to was, whether there was a preponderance of salt or of fresh water at the place, they should certainly have had great difficulty in finding it to be a correct exposition of the law; and the Lords Moncreiff and Cockburn say, that if the sentence had stood alone as the substance of the charge, it would have been liable to exception; and Lords Corehouse and Mackenzie say, that they did not consider that the prevalence of salt or fresh water was the chief circumstance to be regarded.

I quite agree with the consulted judges and others, who thought, that if the direction was to be considered as implying, that the fact of the absence or predominance of fresh water was the only thing to be looked to, or, in other terms, was the thing upon which in their opinion the verdict was to be founded, it would be erroneous; but I totally differ from them in thinking

of the direction of the learned judge, it follows that the bill of exceptions ought to have been allowed, and that the judgment of the court below ought therefore to be reversed. It is therefore unnecessary, and would be improper, to pronounce any opinion or decision as to what ought to have been the direction. But as there is much of uncertainty in the decisions which have taken place, and much doubt appears to exist as to the proper rule to be followed, I think it may be useful to throw out some suggestions, to which those who may have to decide upon the merits of this and other similar cases, in the first instance, will give such weight as they may think them entitled to.

The statute of Robert the First, in the year 1318, speaks of waters in which the sea rises and falls, and in which the fish descend and ascend. The waters mentioned must be distinct from the sea, and this the Don case[1] has established. They must also be waters above the level of the sea, at least at low water, because otherwise the sea could not rise in them, nor would the fish, having the level of the sea, be said to ascend in such waters.

In the subsequent statutes the expressions vary, but it being decided that none of these include the sea proper, I do not apprehend that they in fact extend the limits beyond those prescribed by the statute of Robert the First.

In those waters which are above the point at which the river reaches the level of the sea at low tide, all the circumstances described in the statute of Robert the

[1] Earl of Kintore v. Forbes and others, post, p. 1017.

with directions to allow the bill of exceptions, and to grant a new trial, and to proceed further in the said cause as shall be just, and consistent with this judgment.

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SPOTTISWOODE and ROBERTSON — RICHARDSON and CONNELL, Solicitors.

APPELLANTS AUTHORITIES.—(1*st Exception.*) Robertson, 2 Murr. Rep. 304. 368; Lindsay, 3 Murr. 99; Oswald, 5 Murr. 8; Graham's Trustees, 5 Murr. 99; Graham, 5 Murr. 75; Jones, 2 Carr. & Pay. 196; Starkie on Evid. 154; Burton v. Plummer, 2 Ad. & El. 341, and 4 Nev. & Man. 315; Doe v. Perkins, 3 T. R. 749; Adam on Trial by Jury, 171. 238. 306.

(2*d Exception.*) Balfour, voce Fishings; Stair, b. ii. tit. iii. sec. 70; Ersk. b. ii. tit. vi. sec. 15; Bank. b. ii. tit. iii. sec. 70; Earl of Moray v. Duke of Gordon, (Spey Case,) 16th April 1728, Mor. 12797; Earl of Kintore v. Forbes, (Don Case,) 31st May 1826, F. C., 4 Sh. & D. 641, or 648 new edit., S. C., 11th July 1828, as affirmed, 3 W. & S. 265; Oswald v. M'Whir, (Solway Case,) 11th March 1837, F. C., 15 D., B., & M., 873: Statutes, (Scots Acts,) see Thomson's edit., Robert I., 1318, c. 12; James I., 1424, c. 12; 1427, c. 6 or 116; 1429, c. 22 or 131; James II., 1457, c. 34 or 66; James III., 1469, c. 13 or 87; 1477 or 1478, c. 6 or 73; James IV., 1488, c. 13 or 16; 1489, c. 16; 1503, c. 17 or 72; James V., 1535, c. 16; Mary, 1563, c. 3; James VI., 1579, c. 27; 1581, c. 15; 1685, May 30; William III., 1696, c. 35; 1698, c. 3; Anne, 1705, c. 12.

RESPONDENTS AUTHORITIES.—(1*st Exception.*) 1 Phillipps on Evidence, 289 (7th edit.); Starkie on Evidence, 155 (2d edit.); Tait on Evidence, 372 (2d edit.); Bell's Princ. 653.

(2*d Exception.*) Bell's Princ. 296, 8; Bell's (Wm.) Digest, voce Salmon; Earl of Kinnoul v. Hunter and others, (Seaside Case,) 26th Jan. 1802, Mor. 14301; Duke of Athol and others v. Maule, (Tay Case,) 7th March 1812, F. C. and Buchanan's Rep. 254; S. C. 5 Dow, 282, 4th Feb. 1817, F. C.; Magistrates of Dumbarton v. Colquhoun, (Clyde,) 16th Jan. 1813, F. C.; Carnegie's Trustees v. Erskine and Ross, (South Esk,) 1812, not rep.; Carnegie, (South Esk,) 7 S. & D. 284; Fraser v. Grant and others, 5th Dec. 1817, (Beauly,) not rep.; Fraser, 13th Nov. 1829, (Beauly,) 8 S. & D. 14; M'Kenzie and others v. Magistrates of Tain, 7th Mar. 1817 and 5th June 1818, (Dornoch,) not rep.; M'Kenzie v. Houston, 26th Feb. 1831, (Dornoch,) not rep.; Sir James Colquhoun v. Duke of Montrose, Mor. 14283; Duke of Queensberry v. Marquess of Annandale, Mor. 14279.

[*26th August* 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 38.)

JAMES PEDIE, Appellant.[1]

[*John Stuart.*]

ARCHIBALD SWINTON and others, Respondents.

[*Tinney.*]

Nuisance — Interdict.—An application being made for suspension and interdict against the erection of slaughter-houses, the party complained against, after interim interdict, alleged that he had discovered a mode of conducting the proceedings in these houses which would prevent their being a nuisance. The Lord Ordinary (Corehouse) passed the bill, but in respect the party complained against "desired to go on with the erection of the buildings at his "own risk, and agreed that his doing so shall not be "considered as affording him any plea of favour when the "question of nuisance shall be determined," recalled the interdict in so far as it prohibited the erection of the buildings, but quoad ultra continued the interdict. Upon discussing the expede letters, the Lord Ordinary (Fullerton) found that the erection of shambles or slaughter-houses in the situation proposed would be a public nuisance, and therefore sustained the reasons of suspension, and continued the interdict, and found the respondent liable in expenses. The court, upon a reclaiming note, after ordering a condescendence of the precautionary measures the respondent (appellant) meant to adopt, and having examined plans and models of the buildings, adhered to the interlocutor of Lord Fullerton. The House of Lords (the party complaining having intimated that he had no desire to foreclose the party complained against

[1] 15 D., B., & M., 775.

from having his case reconsidered upon a change of circumstances,) declared, that the appellant ought to be interdicted in the terms of the interlocutor of the Lord Corehouse; and that liberty be reserved to the appellant to apply for an opportunity to try the experiment, whether he can conduct the business of slaughtering cattle upon his premises, mentioned in the appeal, without creating a nuisance.

1st Division.

Lds. Ordinary Corehouse and Fullerton.

THE appellant and respondents were proprietors of adjoining grounds near Stockbridge, in the neighbourhood of Edinburgh. A bill of suspension and interdict was presented to the Lord Ordinary on the bills, at the instance of the respondents, setting forth that the appellant was about to erect, upon his property, a range of shambles or slaughtering houses, which they alleged would prove a nuisance to their property, and would tend to pollute a mill-lead which passed in the neighbourhood. The bill prayed that the appellant should be interdicted "from proceeding with the erection of said "houses and buildings at present in progress on his "property aforesaid, as shambles or slaughterhouses for "the slaughtering of cattle and other beasts, and from "erecting any other buildings thereon for the said purposes; and from letting, using, and occupying all or any "part of his said property, and the buildings erected "and to be erected thereon, as slaughterhouses or "shambles, for the purposes aforesaid; and from emptying or depositing the offals or other impure matter "therefrom into the mill-lead aforesaid, or in any other "matter thereby prejudicing the interests and properties of the complainers."

When this bill was presented an interim interdict was granted, ex parte, by the Lord Ordinary, in general terms. A hearing then took place before the Lord Ordi-

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Statement.

nary, in consequence of which a minute was presented for the appellant, stating that he did not object to the passing of the bill upon caution, for the purpose of trying the question of nuisance; and with regard to the interdict, that he did not object to its being continued, in so far as related to the pollution of the mill-lead. He farther represented, that in case the Lord Ordinary should be of opinion that the interdict ought in the meantime to be continued to any greater extent, it ought at least to be recalled in so far as related to the erection of the houses and other buildings at present in progress, or any other buildings, and ought to be confined to the letting, using, or occupying all or any part of his said property, and the buildings erected or to be erected thereon, as slaughterhouses or shambles for the purposes aforesaid. That he was perfectly aware that the erection of these buildings must now, in consequence of this judicial challenge, be at his own risk. But he was confident that he would be able to prove to the satisfaction of the court that his projected operations, in a new and improved form, would constitute no nuisance such as to entitle the respondents to interfere. The following interlocutor was thereafter pronounced by Lord Corehouse.

" The Lord Ordinary, having considered the bill and " answers, with the minute for Mr. Pedie, and having " heard counsel for the parties, and inspected the pre- " mises in question, passes the bill; but in respect that " Mr. Pedie desires to go on with the erection of the " buildings at his own risk, and agrees that his doing so " shall not be considered as affording him any plea of " favour when the question of nuisance shall be deter- " mined; recals the interdict, in so far as it prohibits

" the erection of the buildings, but, quoad ultra, " continues the interdict."

The record being closed upon reasons and answers, and pleas in law, the Lord Ordinary (3d March 1836) pronounced the following interlocutor:—" The Lord Or- " dinary (Fullerton) having heard parties procurators, " and considered the closed record, and visited the " ground, finds that the erection of shambles or " slaughterhouses, in the situation proposed by the " respondent (appellant), would be a public nuisance, " and therefore sustains the reasons of suspension, and " continues the interdict, and decerns; finds the respon- " dent (appellant) liable in expenses; and remits the " account thereof when lodged to the auditor to tax the " same, and to report." *Note.* " It has been repeat- " edly decided that the slaughtering of cattle in the " suburbs of a town, or in the immediate neighbour- " hood of inhabited houses, is a common nuisance. " Whether or not it be possible to devise means by " which the various offensive consequences of such " operations may be mitigated, or entirely avoided, it " is not for the Lord Ordinary to determine; primâ " facie, it does not seem likely; but at any rate, if " there be such a possibility, it was incumbent on the " respondent (appellant) to show how it was to be ac- " complished. But the respondent (appellant), though " perfectly apprized by the proceedings in the Bill " Chamber of what would be expected of him, gave no " explanation, but merely avers in general ' that the " ' shambles are to be erected on a new and improved " ' plan, by which there will be nothing offensive to " ' the sight or smell,' &c. In these circumstances

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"the Lord Ordinary thinks the interdict must be con-"tinued."

Against this interlocutor the appellant presented a reclaiming note to the First Division of the Court, and their Lordships, pronounced this interlocutor:—6th Dec. 1836, "The Lords, having advised this reclaiming "note, and heard the counsel for the parties, appoint "the reclaimer to lodge in process plans of the build-"ings he proposes to erect, and a special condescen-"dence of the precautions he means to adopt, in order "to satisfy the Court that his shambles will not be a "public nuisance.[1]"

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[1] The following was the condescendence lodged for the appellant:—"The condescender herewith produces a ground plan and an elevation plan "of his proposed buildings, part of which are already erected; and he "has also prepared a model in wood, on a large scale, of such a portion "of the building as will enable any one who examines it, to understand "the details. The slaughter-houses are to consist of two ranges of build-"ings, parallel to each other, running from east to west, at the distance "of about twenty feet from each other. The interposed space, which is to form a court, being flanked with high walls on the east and west, will be entirely excluded from view. The only access to it is to be by "an opening in the northmost range of buildings, where there is to be a "gateway. This opening establishes a communication between the court "and a stable-lane, which is to run parallel with the court, and the two "extremities of which, on the east and west, open out to public roads or "lanes. This stable lane is interposed between a range of stables and "coach-houses on the south, and a range of byres on the north. Still "farther to the north, the ground between the byres and the public road "is to be occupied by a range of self-contained dwelling-houses, with "back greens attached to them. The eastern end of the stable lane "opens upon a parish road running north and south, by means of which "cattle coming from the eastward may be introduced. The western end "of the stable lane opens upon a lane which is shewn upon the plan, "&c. The slaughter-houses consist of several separate killing places, "which all open into the court, and have windows in the roof. The "buildings consist of stone and lime, and the roofs are slated. The "court is causewayed with whinstone causeway. Each killing place "occupies an area of about nineteen feet square within walls; the floors "consisting of the best and strongest Craigleith ashlar pavement, eight

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Judgment of Court, 9th March 1837.

Thereafter the Court pronounced the following interlocutor:—"The Lords, having resumed consideration "of this reclaiming note, with the condescendence or- "dered, and answers thereto, and the plans and models "of the buildings, and heard counsel, adhere to the "interlocutor of Lord Fullerton of 3d March 1836, "and refuse the desire of the note, but find no ex-

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"inches thick, squared and jointed, and broached or droved on the surface. "The walls immediately above the pavement, all round, are coursed, and "the stones laid square, so as to be perfectly tight. The pavement is not "laid horizontal, but forms an inclined plane; so as that any liquid spilt "upon the floors, will immediately find its way into the cess-pool. By "this means the floors can be made perfectly clean by merely pouring "water upon them. Between each pair of killing places a cess-pool or "dung-pit is constructed, which is somewhat like a closet of six feet "square, the floor of which is sunk considerably below the level of the "adjoining pavement, and consists of a hewn stone trough, well jointed, "and neatly broached, so as to be perfectly tight. Into this trough, "whatever liquid is spilt, or water is poured upon the pavement of the "killing places, will find its way, by means of a small aperture. No "liquid can ever escape from the killing places to the outer court; but "from the inclination of the floors, and the construction of the doors of "access, the whole is immediately discharged into the cess-pool. The "upper part of this square closet is completely shut in, and excluded "from the outward air, there being merely an opening to each of the "killing places, for the purpose of discharging into it any refuse, which "opening can be shut by a close lid. These cess-pools are to be cleansed "every second day by the farmer to whom the manure is let, before five "o'clock in the morning. For this purpose there is an access from the "outer court into the cess pool by a locked door, of which he has a key. "The cattle are to be brought into the killing places at a very early hour "in the morning, so that there will be no such thing as danger from the "driving of the cattle, either in the street or in the lanes. By means of "these contrivances there will be neither danger nor offence either to the "sight or smell. It will be perfectly impossible for any one on the out- "side of the establishment to see any thing that goes on either in the "slaughter-houses or in the court. Even in the court itself there will be "no appearance of filth or of blood, and from it there will be no immis- "sion into the mill-lead, of any filthy or offensive substance whatever. "There will be no smell of an offensive kind even in the court, and far "less on the outside of the buildings, or in the neighbourhood. This "will be effectually prevented by keeping all the refuse from being "exposed to the action of the outer air, and by its being regularly "and frequently taken away."

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"penses due since the date of said interlocutor; of "new, remit the account," &c.

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Against the interlocutors of the Lord Ordinary of 3d March 1836, and of the Court of 9th March 1837, the appellant entered his appeal, contending that the effect of these interlocutors was to exclude him from making a trial of his slaughter-houses, with a view to determine the question, whether they would create a nuisance; that this was unjust, because it was impossible determine, without a trial, whether such nuisance would be occasioned; and that it was also illegal, because, by special act of parliament, the determination of questions of nuisance are, in Scotland, appropriated exclusively to the cognizance of a jury.

Ld. Chancellor's Speech, 25th June 1838.

LORD CHANCELLOR.—My Lords, according to the facts, as they appear before the House, and according to the natural construction I should put upon the interlocutor complained of, I have no difficulty in suggesting to your Lordships that the course ought to be pursued which has been suggested at the bar. I therefore do not propose, at this moment, to move your Lordships judgment, but to give the appellant an opportunity, if he can, of satisfying your Lordships that the course of proceeding would not be open to him, which, from the papers before the House, I apprehend would.

The suit in discussion is to prevent the appellant from proceeding to erect slaughter-houses upon a very large scale. Now, the erection of slaughter-houses, generally speaking, would be a nuisance according to the law of Scotland, which is not disputed. Several decisions have established that it is so; and it is accord-

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ing to the practice of the law in Scotland, when erections are made which, if completed, would amount to a nuisance, to interdict the proceedings of the party, for the purpose of protecting persons interested, and the neighbourhood, from any injury that might be sustained from such a nuisance. The course of proceeding in Scotland is similar to the course of proceeding in this country. In England the Court interferes by injunction, or finally by a discontinuance of that injunction, if there is any doubt of the fact of a nuisance, for the purpose of enabling the parties to try it.

The appellant in this case, not pretending to dispute the rule of law, that generally speaking a slaughter-house would be a nuisance, suggests various modes by which the nuisance might be avoided.

Now, it so happens that these plans which are suggested would not depend upon any mode of proceeding which would prevent the nuisance independently of the act of the party; he says he means to clean out the cess-pools every second day, and that the cattle are to be driven by a certain hour in the morning: all that entirely depends upon his volition, and is not a fact which can be tried, if the question were sent to a jury. An inquiry, before a jury, to ascertain whether if this thing were done there would be a nuisance or not, could lead to no conclusion at all affecting the rights of the parties. On the other hand, if the suggestions were of the same nature as in Trotter's case[1], then indeed the Court could see grounds upon which it might safely proceed.

The orders, as they stand printed, undoubtedly would shew that the appellant is not prohibited from continuing the erection of these buildings; but if the appellant

[1] See post, p. 1027.

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can satisfy your Lordships to the contrary, it will be material before you finally dispose of this case. It appears that, in the first instance, he was prohibited from erecting the buildings at all. That was altered by an order, which, as printed, is thus: "But in respect that "Mr. Pedie desires to go on with the erection of the "buildings at his own risk, and agrees that his doing "so shall not be considered as affording him any plea "of favour when the question of nuisance shall be de-"termined, recalls the interdict, in so far as it prohibits "the erection of the buildings." The moment that interdict was pronounced it stood good as an interdict against what was alleged to be nuisance, but it was no interdict against continuing the buildings. In March 1836, the Lord Ordinary sustained the reasons of suspension, and continued the interdict The only interdict was the one I have just stated. The question came before the Inner House; and the Court adhered to the interlocutor of Lord Fullerton, namely, of the 3d March 1836, which was the interlocutor I last stated; and the result of that would show, that at this moment there is no interdict against continuing the building. If however the appellant is able to show your Lordships that some mistake has been made in the mode in which the interdict is printed, and that there is an interdict against continuing the building, he might possibly induce your Lordships to alter the interlocutor in that respect.

What he says is in substance, "I am so satisfied that "I can prevent any nuisance,—and I will satisfy the "Court of Session, or this House, that no nuisance "will arise in carrying on the business of a slaughter-"house in these premises,—I am willing to be at the

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"expense of erecting slaughter-houses, taking the "chance of being able to carry on the business." Certainly, so far, there is room for confidence that he will be able ultimately to succeed in carrying on the business without creating a nuisance. The court however were not satisfied that that which he suggested was sufficient to enable him to call upon them to rescind the interdict altogether; and I am clearly of the same opinion. The business itself is declared and recognized by the law of Scotland as a nuisance; and certainly, that he means to carry it on in a particular form, is not a reason why the Court of Session ought to entrust him with a power to expose the interests of the inhabitants to that which the law considers a nuisance.

Then comes the other question to which I would also wish to draw your Lordships attention. It has been argued at the bar, that he is precluded from saying to the Court at a future time that he has devised means by which he will be able effectually to prevent the nuisance. In the case of Trotter[1] I find that this House adopted the course which, subject to what may hereafter be shown by the appellant, I should advise your Lordships to adopt; but, practically, notwithstanding the judgment of the Court, in the first instance, and of this House affirming it, the party was permitted to show that by pursuing the mode he intended to adopt, that that which, primâ facie, would be a nuisance, would not be a nuisance. I cannot doubt therefore, but that in the present case the same course of proceeding might be open to the appellant, as was practically proved to be

[1] Trotter v. Farnie and others, 7th Dec. 1830, 9 S., D., & B., 144; affirmed, 1st Oct. 1831.

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open to the appellants in the case to which I have referred. There the party was about to erect a building for the purpose of boiling whale blubber, which by prior cases had been held to be a nuisance. It was suggested to the Court, that although, primâ facie, that was a nuisance, and, if conducted in an ordinary manner, would be a nuisance, yet he had the means, from a particular form or system of carrying it on, to prevent it being a nuisance. The Court of Session were not satisfied that the course suggested would be sufficient to protect the property of persons in the neighbourhood, and they interdicted him "in so far as regards the "boiling whale blubber in the premises in question;" and this House[1] affirmed the interlocutor, and prevented further proceeding. So far the cases are similar. He afterwards procured the assistance of a gentleman of great eminence[2], who suggested means by which they were enabled to apply to the Court of Session for that purpose; and I have no doubt that a similar course is open to the appellant in the present case. It is quite impossible to suggest a mode at the present time for trial, according to the suggestion of the appellant.

I am anxious, undoubtedly, to give the party an opportunity of satisfying your Lordships that the interlocutor would prevent him from applying to the Court of Session for a discharge of the interdict, upon the ground that he has discovered the means of avoiding the nuisance, and can satisfy the Court that he might safely be permitted to proceed with his work and his business, securing those whose interests are likely to be affected. If he can satisfy your Lordships that he cannot

[1] 1st October 1831.

[2] Professor Leslie.

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do that as the matter now stands, there may be a reason for a variation of the interlocutor.

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For the purpose of giving the appellant an opportunity to communicate further information to your Lordships upon the points to which I have alluded, I will now suggest that your Lordships should abstain at this moment from finally disposing of the case. But, undoubtedly, unless the appellant can satisfy your Lordships upon those points, considering the circumstances of the case, I will advise your Lordships to dismiss the appeal, with costs. If it become necessary for counsel to attend here, of course you will give them the opportunity. If the appellant hand in a written statement, the House will then say whether the other side shall have an opportunity of answering it.

Statements were thereafter given in on both sides, the only part of which material to notice will be found in the following speech :—

Ld. Chancellor's Speech, 26th Aug. 1839.

LORD CHANCELLOR.—My Lords, at the hearing of this appeal I expressed my opinion that the Court was right in continuing the interdict under the then existing circumstances. But, as the Lord Ordinary's interim interdict, whilst it prohibited the nuisance, permitted the appellant to go on with the buildings at his own risk, (he agreeing that his doing so should not be considered as affording him any plea of favour when the question of nuisance should be determined,) was founded upon a representation on the part of the appellant, that he should be able to show that from the manner in which he proposed to conduct the business of slaughtering cattle, all nuisance to the neighbourhood would be avoided, I thought it unjust, after

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the appellant had proceeded upon the faith of such an arrangement, that any interdict should be subsequently pronounced, preventing the further building of the projected premises, or which should not be capable of being relaxed, (for the purpose of enabling the appellant to try the experiment by which he hoped to be able to prevent the nuisance usually arising from his business,) and, if necessary, ultimately recalled.

How far the existing interlocutors were consistent with this view of the case was the subject of a difference of opinion. The case therefore stood over for the purpose of ascertaining that point. The result has been a statement on each side, contending for directly opposite positions; but on the part of the respondents an offer has been made which precludes the necessity of coming to any conclusion upon that subject; for after contending that the interdict, as it exists, does not prevent the appellant from proceeding with the building, they say that they have no desire to foreclose the appellant from having his case reconsidered upon a change of circumstances, and the interdict recalled upon cause shown, or a remit to the Court, with power, if they shall see cause, to entertain and dispose of such an application.

The appellant has not shown that the existing interdict prevents his continuing the erection of the building, nor has he succeeded in proving that he should be able effectually to prevent the nuisance, if permitted to commence the business of slaughtering cattle; and yet he has appealed against the whole of the interlocutor granting the interdict. In this he was, I think, wrong; but I am by no means satisfied that the interlocutors are altogether right, because I think they ought, after what had before

taken place, to have been so framed as to give to the appellant an opportunity of applying in the cause to the Court for liberty to try the experiment he has suggested, and that there should have been reserved to the Court the power of dealing with the interdict as might be just after such experiment had been tried.

I therefore think that the right order for the House to make will be to declare that the appellant ought to be interdicted in the terms of Lord Corehouse's interlocutor, which will enable him to proceed with his intended buildings, if he shall think proper to incur the risk of so doing; and that liberty ought to be reserved to the appellant to apply to the Court for an opportunity to try the experiment, whether he can conduct the business of slaughtering cattle upon those premises without creating a nuisance; and that power ought to be reserved to the Court to recal, alter, or vary the interdict, and to make such order therein as shall be just, after the result of such experiment shall have been ascertained. And with this declaration the cause ought to be remitted to the Court of Session to be reviewed, and to have such alterations, if any, made as may be necessary for these purposes. There can be no costs of the appeal.

The House of Lords declared, That the said appellant ought to be interdicted in the terms of the interlocutor of the Lord Corehouse, Ordinary, pronounced on advising the minute of the appellant; and that liberty be reserved to the appellant to apply to the said First Division of the Court of Session for an opportunity to try the experiment, whether he can conduct the business of slaughtering cattle upon his, the appellant's, premises, mentioned in the appeal, without creating a nuisance; and that power be reserved to the said First Division of the Court of Session to recal, alter, or vary

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the said interdict, and to make such order therein as shall be just, after the result of such experiment shall have been ascertained: And it is ordered, That with this declaration the cause be remitted back to the First Division of the said Court of Session, to review the said interlocutors, and to have such alterations, if any, made therein as may be necessary for the said purposes, and as shall be consistent with this declaration.

A. DOBIE — RICHARDSON and CONNELL, Solicitors.

[*27th August* 1839.]

(Appeal from the Court of Session, Scotland.)

Sir WILLIAM FRANCIS ELIOTT of Stobs and Wells, Bart., Sir JAMES BOSWELL of Auchinleck, Bart., and others, his Trustees, Appellants.[1] (No. 39.)

[*John Stuart.*]

JAMES CLEGHORN Esq., of Halkburn, and GEORGE CLEGHORN Esq., of Weens, and the Trustees of the late JOHN WILSON Esq., of Hallrule, Respondents.

[*Attorney General (Campbell) — Sir William Follett.*]

Et è contra.

Entail — Statute 42 *Geo.* 3. *c.* 116. — *Restitution.* — An heir of entail having sold certain portions of an entailed estate, under a warrant from the Court of Session, applied the purchase money, 1st, in redemption of the land tax; 2d, in payment of entailer's debts; and, 3d, in payment of provisions to younger children. The sales were set aside as irregular at the instance of a succeeding heir. In an action of declarator, repetition, and damages, by the purchasers,—Held (affirming the judgment of the Court of Session), 1st, that the estate should be liable to an annual payment corresponding to the land tax, redeemable on payment of a sum specified as the value thereof; 2d, that in so far as the prices of said lands were applied in payment of debts of the entailer, the same should form real burdens upon the estate; and 3d, that such should also be the case with the sums applied in payment of provisions, although the same might not have been kept up by assignation. Farther, that the heirs of entail should not be liable to personal diligence for payment of the principal sums of any of said provisions, but that they should be personally liable successively for payment of the interest

[1] Fac Coll., 2d June 1837.

of such sums during their possession of the estate respectively. Further, that the same forms of diligence should be competent for the debts of the entailer as if the same had been still subsisting in the persons of the original creditors; and also, that the same form of diligence should be competent for any of the sums of provisions for younger children which would have been competent if the same had not been discharged; "declaring always, that this "decree shall be subject to all the provisions and de- "clarations of the deed of tailzie of the lands in question, "&c.; and declaring all the said findings to be without "prejudice to any questions which may arise as to the ef- "fect of any particular form of action or diligence which "may be raised in any particular case in virtue thereof."

1st Division.

Lord Ordinary Moncreiff.

THE late Sir William Eliott, professing to take advantage of the statute 42 Geo. 3. c. 116., which authorizes entailed proprietors to sell a portion of the entailed estate for redemption of the land tax, made an application accordingly to the Court of Session in May 1803, and having obtained their warrant to sell certain parts of the entailed estate specified in the application, Sir William himself became the purchaser, at the price of 15,420*l.* Sir William afterwards sold the same lands in different lots to the respondents, and thereby obtained an advance of price amounting in the whole to 23,912*l.* 10*s.* Besides redeeming the land tax (which amounted only to 56*l.* 8*s.* 7¼*d.*) for the sum of 1,183*l.* 9*s.* 5*d.*, various burdens upon the estate were paid off, viz., two debts of the entailer, amounting respectively to 1,111*l.* 2*s.* 2*d.* and 111*l.* 2*s.* 2*d.*; provisions to three children of a former proprietor, Sir Francis Eliott, of 1,170*l.* each; another provision to a son of a previous proprietor, amounting to 2,500*l.*; and likewise provisions by Sir William himself, amounting to 5,483*l.* 0*s.* 4¼*d.* Of these four classes of debts, the first three were paid during Sir William's

life-time on simple discharges. The debts forming the fourth class were paid after Sir William's death, and assignations were taken.

In 1812 Sir William died, and was succeeded by the present appellant, who brought an action of reduction of the sales, founded on various violations of the statute. The Court of Session (7th June 1825) reduced the whole of the sales, and their judgment was affirmed on appeal, 2d May 1828.[1] In the meantime the purchasers brought an action of relief and damages against Mr. Riddell, the statutory trustee, alleging that he, as agent and trustee, was bound to have seen the proceedings regularly carried through under the statute; but Mr. Riddell was assoilzied from that action, reserving liberty to cause Mr. Riddell to repeat and pay back any parts of the sums received by him, and not applied for the purposes above specified, on a proper process to that effect. The purchasers then raised the summons, (dated and signeted 3d January 1827,) which has given rise to the present appeal, directed against the appellants and Mr. Riddell's trustee (he having died), which, after stating in detail the leading facts above mentioned, subsumes, 1st, that the defender Sir William Francis Eliott, as representing the late Sir William, is liable for the whole sum of 23,912*l.* 10*s.* paid by the pursuers; 2d, that the heirs of entail are liable for the original price of 15,420*l.* paid by the late Sir William, or for such part thereof as was applied beneficially in terms of the act of parliament; 3d, that in so far as the 15,420*l.* was not applied beneficially in terms of the act of parliament, the representatives of Mr. Riddell, the trustee, are liable, and then

[1] 3 Wilson and Shaw's Appeal Cases, p. 68.

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concludes, 1st, against Sir William Francis Eliott, as representing the late Sir William, for the said sum of 23,912*l.* 10*s.*, and for 10,000*l.* of damages; 2d, in the event of the first conclusion not being successful, against Mr. Riddell, for the original price of 15,420*l.*, in so far as the same may not have been applied strictly in terms of the statute; 3d, against Sir William Francis Eliott and the other heirs of entail to repeat and pay back the original price of 15,420*l.*, or at least such part thereof as had been applied in terms of the statute. There is also a conclusion that the entailed estate is liable and may be adjudged in payment of the said price of 15,420*l.*, or at least such part thereof as can be shown to have been applied beneficially in terms of the statute.

In defence it was pleaded for the appellant, 1, that he, as representing his father in no other character than that of heir of entail, is only liable in payment of entailer's debts, and debts which may have been subsequently created upon the entailed estate in virtue and in terms of the deed of entail; 2, that the pursuers are not vested in the right of any of the entailer's debts or other debts legally affecting the entailed estate, and consequently are not entitled to sue for payment of the same, either directly or indirectly; 3, that at the time of the defender's succession to the estate of Stobs, none of the debts specified in the condescendence, excepting the provisions to his younger brothers and sisters, affected that estate, or the portion thereof which had been sold to the pursuers, and it is not competent to claim payment of any debts from the defender as heir of entail, under any of the conclusions of the present summons; 4, that the defender Sir William Eliott, as heir of entail, is not liable for any debts or burdens paid, or any outlay or expendi-

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ture made by the pursuers or their authors upon the estate, the same having been paid and expended in reliance on the security of the late Sir William Eliott, with whom the authors of the pursuers dealt in the character of fee simple proprietor.

For Mr. Riddell's trustee it was pleaded, that it is res judicata that Mr. Riddell was not liable in damages to the pursuers for alleged misconduct as Sir William Eliott's agent, or as trustee in regard to the matters set forth in the summons, and consequently his trustee cannot be bound to make good any part of the loss sustained in consequence of the sales being found ineffectual.

Judgment of Court, dated 18th January and signed 7th February 1839.

Upon the report of Lord Moncreiff, the following judgment was thereafter pronounced by the First Division of the Court of Session:—"The Lords having "advised this cause, with the cases for the parties, "and heard counsel, Find the pursuers entitled to "repetition of the several sums of money applied in "payment of burdens and of debts affecting the entailed "estate of Stobs, or for which the said estate was liable "to be affected: Find that the following sums were so "applied; viz. the sum of 1,183*l.* 9*s.* 5*d.* for redemption "of the land tax of the said entailed estate; the sum of "1,111*l.* 2*s.* 2*d.* paid in extinction of the debt of the "entailer Sir Gilbert Eliott to the Countess of Hynd-"ford; the sum of 111*l.* 2*s.* 2*d.* paid in extinction of a "debt of the said entailer to William Calderwood, "advocate; the sum of 1,170*l.* in extinction of a pro-"vision made by Sir Francis Eliott in favour of Miss "Mary Eliott, his eldest daughter, paid to the Countess "of Hyndford; the sum of 1,170*l.* in extinction of a "provision made by the said Sir Francis Eliott in "favour of Miss Anne Eliott his youngest daughter,

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" paid to the Countess of Hyndford; the sum of 2,500*l.* " in extinction of a provision made by Sir John Eliott " to Anne Eliott, his only child, paid to the Edinburgh " Friendly Insurance Society; the sum of 1,170*l.* in " extinction of a provision made by the said Sir Francis " Eliott in favour of John Eliott his second son, paid to " Charles Eliott's trustees; the sum of 5,483*l.* 0*s.* $4\frac{4}{12}$*d.*, " being the amount of provisions granted by the late " Sir William Eliott in favour of John Eliott his second " son, Gilbert Eliott his third son, Bethia Mary Eliott " his eldest daughter, and George Augustus Eliott his " fourth son, in terms of the entail, and for which the " said entailed estate was liable to be affected: Finds, " that for the above-mentioned sums the said pursuers " are just and lawful creditors of the heir of entail of " the estate of Stobs, now in possession thereof, and of " each succeeding heir of entail of the said estate who " shall obtain possession thereof, while the said debts " shall remain unpaid: Find and declare that the pur- " suers, as creditors foresaid, are entitled, omni habili " modo quo de jure, to adjudge the said entailed estate " of Stobs in payment and satisfaction of the said sums " applied as aforesaid, and decern: And farther, decern " and ordain the said Sir William Francis Eliott, as " heir of entail in possession of the said estate, and the " heirs of entail who shall succeed to him in the right " and possession thereof as they shall respectively attain " possession, to make payment to the pursuers of the " foresaid several sums of money: And in respect of the " preceding findings assoilzie Claud Russell, the trustee " for the creditors of the late William Riddell, and all " others the representatives of the said William Riddell " and of Edgar Hunter, his cautioner, from the con-

" clusions of the libel to the extent of the said several " sums of money, and decern: Quoad ultra, remit to " the Lord Ordinary to hear parties farther as to the " sum of 622*l.* 8*s.* 1*d.* alleged to have been expended " by Sir Francis Eliott on improvements on the entailed " estate; likewise as to the several dates from which " interest on the said several sums shall run; also as to " the balance still due by the late Mr. Riddell and " his cautioner, and their representatives; and as to " what farther sums fall to be charged against the " entailed estate and heirs of entail; and generally, as " to all other remaining points of the cause, and to do " therein as shall be just: Find the defenders, Sir " William Francis Eliott, and Sir James Boswell, " George Sinclair, and James Brown, his trustees, who " have sisted themselves as parties to this action, and " that only quà trustees, liable to the pursuers in the " whole expenses hitherto incurred by them in this " action, and ordain the account thereof to be given in; " and when so given in, remit to the auditor of Court " to tax the same, and to report."

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This judgment formed the subject of an appeal by the appellants, and a cross appeal by the purchasers against the present appellant and also against Mr. Riddell's trustee, in so far as it fell short of the conclusions of their summons, upon which the House of Lords pronounced the following judgment: — " After hearing " counsel, as well on Monday the 14th, Tuesday " the 15th, and Tuesday the 22d days of April 1834, " as on Monday the 31st day of August last, and " Tuesday the 1st day of this instant September, upon " the original petition and appeal of Sir William " Francis Eliott of Stobs and Wells, baronet, and of

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" of the said William Riddell, and of Edgar Hunter " his cautioner, are assoilzied, and praying that the " same might be reversed, varied, or altered, so far as " complained of, or that the appellants might have such " relief in the premises as to this House, in their Lord- " ships great wisdom, should seem meet; as also, upon " the answer of James Cleghorn esq., of Halkburn, " and George Cleghorn esq., of Weens, and David " Watson, writer in Edinburgh, their commissioner; " and Edward Filder esq., of Mellington Hall, Mont- " gomeryshire; the Reverend James Glen of Argyll " Place, London; Henry George Watson, accountant " in Edinburgh; and William Wilson, clerk to the " signet, trustees of the deceased John Wilson esq., " of Hallrule, put in to the said original appeal; and " also upon the answer of Sir William Francis Eliott " of Stobs and Wells, baronet; and of Sir James Bos- " well of Auchinleck, baronet; George Sinclair esq., " of Ulbster; and James Brown esq., accountant in " Edinburgh, trustees of the said Sir William Francis " Eliott; and also upon the answer of Claud Russell " esq., accountant in Edinburgh, trustee for the cre- " ditors of the late William Riddell esq., of Camies- " ton, severally put in to the said cross appeal; and " due consideration had this day of what was offered on " both sides in these causes: It is ordered and ad- " judged, by the Lords Spiritual and Temporal, in Par- " liament assembled, that the said cause be remitted " back to the said First Division of the Court of " Session, to review their interlocutor complained of " in the original appeal; and farther, to state to this " House whether, in pronouncing the same, they have " had regard to the eighth finding of the interlocutor

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" pronounced by the Court of Session of the 7th day of " June 1825, in the action of reduction brought by " the defender Sir William Francis Eliott, which finds " it proved, by the terms of the dispositions to the " defenders in that action, that they were made aware " that the act of parliament had not been followed out[1]; " and also to state to what extent, and under what " form of diligence, the present defender Sir William " Francis Eliott, as heir of entail in possession of the " said estate, and the heirs of entail who shall succeed " him in the right and possession thereof, as they shall " respectively attain possession, may be compelled, " according to the law of Scotland, to make payment " to the pursuers of the several sums of money in the " said interlocutor mentioned: And it is further ordered " that the said First Division of the said Court, in re- " viewing their said interlocutor, do order the matter " thereof to be heard before the whole Judges of the " Court of Session, including the Lords Ordinary: " And this House does not think fit to pronounce any " judgment upon the said appeals until after the said " Court of Session shall have reviewed their said inter- " locutor according to the directions of this order."

Judgment of Court, 1st July 1836.

In consequence of the preceding judgment the cause was heard before the whole judges of the Court of Session, in February 1836. Thereafter the following interlocutor was pronounced: — " The Lords of the " First Division having considered the letters of the " Lord Chancellor to the Lord President, with the " letter by the Earl of Devon to the Lord Chan- " cellor, explanatory of the remit by the House of " Lords in the case of Cleghorn and Wilson v. Sir

[1] See 3 W. & S. 68.

" William Eliott, direct the said letters to be printed " and laid before the Lords of the Second Division " and Lords Ordinary, in order that they may furnish " the First Division with their opinions in writing on " the points contained in the said remit, as explained " by the letter of the Earl of Devon, transmitted by " the Lord Chancellor."[1]

In obedience to this interlocutor the consulted judges (Lords Justice Clerk (Boyle), Glenlee, Meadowbank,

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[1] The letters referred to were as follow:—

" My Lord, " House of Lords, 27th June 1836.

" Having instituted an inquiry into the circumstances of the case of " Sir William Eliott of Stobs v. Cleghorn and Wilson, and having for " that purpose thought it right to apply to the Learned Lords who gave " their particular attention to that appeal, when argued before this House, " I have obtained from the Earl of Devon a letter in explanation of the " terms of remit, as made to your Lordship and the other judges of the " Court of Session, of which I have the honour to inclose a copy. I " should also state, that I have communicated upon the subject with Lord " Denman, who concurs with the Earl of Devon in the explanation " offered in that letter, and which I trust will be satisfactory to your " Lordship and the other judges.—I have the honour to be, my Lord, " your Lordship's most obedient humble servant,

" (Signed) COTTENHAM."

" To the Right Honourable the Lord President of the Court of Session, &c. &c."

" My Dear Lord Chancellor, June 11, 1836.

" I am sorry that accidental circumstances have prevented my sooner " writing to you upon the subject of the case of Eliott v. Cleghorn, with " reference to the letter of the Lord President. I have now carefully " gone over the papers, and think that I can explain with confidence what " was the view with which Lord Brougham and the Lords who assisted " him framed the judgment in question. The case was first argued " during the time that I sat at the table as clerk; but the last argument " took place after I had taken my seat as a peer, and I attended to it, and " had much conversation with Lord Brougham upon the case.

" The printed copy of the petition to apply the judgment gives the " general history of the case. The short substance appears to be this: —

" An action was raised by Cleghorns and others to recover from Sir " William Eliott certain sums of money alleged to have been paid by the " pursuers as the price of certain lands and estates purchased under a " judicial sale thereof, made at the instance of a preceding heir of entail,

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Medwyn, Corehouse, Fullerton, Moncreiff, Jeffrey, and Cockburn) returned the following opinion:—"We understand that this cause having been remitted by the "House of Lords, in order that the interlocutor of the "First Division of the Court, under appeal, might be reviewed generally, subject to the particular instructions "given, as explained by the letters of the Lord Chancellor "and Lord Devon now laid before us, our opinion is

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"but which sale had been in the year 1825 reduced and set down as "irregular.

"The Court of Session sustains this claim to a considerable extent by "the finding set forth in page second of the printed petition.

"This judgment being brought under review by appeal, the House of "Lords thought that it might assist them in coming to a right conclusion "upon the case, if they should be informed, first, whether the judgment in "question was pronounced with or without reference to the fact that the "parties claiming repetition were aware of the irregularity of the sale in "respect of which their claim is now made; and secondly, to what extent, "and by what form of diligence, the claims which are declared valid by "the judgment, can, by the law of Scotland, be made available against "Sir William Eliott, and succeeding heirs of entail. There was some "discussion at the bar upon this latter point. It is not necessary, nor "am I competent to say in what manner the information thus sought for "would affect the ultimate judgment of the House.

"It is sufficient to say that it was conceived that such information "might throw light upon the case, and I cannot think that there will be "any difficulty on the part of the Lords of Session in giving their "answers, when the object of the inquiry is explained.

"The consulted judges can of course give no assistance to their brethren "of the First Division, in answering the first of the special inquiries; "but, upon the second point, the opinion of the whole may be given, "and the whole judgment (which may, I should think, include within it "the answer to the special inquiries) will be in point of form the judgment of the First Division, as in the case of an ordinary remit for consultation of the whole judges.

"This particular form of remit being, as the Lord President observes, "unusual, there is not any particular form in which the judgment given "upon it should be framed; but any form of words which, after reviewing "the former judgment in the ordinary way, conveys an answer to the "first inquiry, and gives the opinion of the court upon the second, will, I "think, be satisfactory to the House, and enable it to come to a final "decision upon the case.—Yours, faithfully,

"(Signed) DEVON."

"To the Lord Chancellor, &c."

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" required on the general merits of the case, with par-
" ticular reference to the question, ' To what extent, and
" ' under what form of diligence, the present defender,
" ' Sir William Francis Eliott, as heir of entail in pos-
" ' session of the said estate, and the heirs of entail who
" ' shall succeed him in the possession thereof, as they
" ' shall respectively attain possession, may be compelled,
" ' according to the law of Scotland, to make payment
" ' to the pursuers of the several sums of money in the
" ' said interlocutor mentioned.'

" With reference to the state of the case as thus pre-
" sented to us, we have considered the written pleadings
" of the parties, and the arguments of counsel in presence
" of the whole court, and now beg leave to deliver our
" opinion as follows:—

" 1. We are of opinion, that the claim made by the
" respondents, in their action directed against the ap-
" pellants and the heirs of entail in the estate of Stobbs,
" in so far as it is a claim for relief, or restitutio in
" integrum, is, in its general substance, a well-founded
" claim in equity, to which this court, as a court of
" equity, ought to give effect, to such extent, and in
" such manner, as the circumstances will admit of con-
" sistently with the general principles of law and justice.
" The case, divested of all specialties, is, that the lands
" in question, having been offered for sale under
" warrants of this court, proceeding on the statute for
" redemption of the land-tax, were purchased by the
" respondents or their predecessors; and that, on the
" faith of having obtained a good title to these lands,
" they paid the prices in the manner set forth in the
" record. And the sales having been reduced and set
" aside in respect of irregularity in the proceedings,

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" and the lands restored to the heirs of entail, while, in " the meantime, the money of the respondents had been " applied to relieve and disburden the entailed estate " of debts and charges, which previously stood as real " and effectual burdens affecting the estate and the heirs " of entail, the respondents claim, by their action, relief " or restitution to the extent of the money so paid and " beneficially applied. The conclusions of the summons " go farther than this, in regard to the form and mode " of redress which is sought. But, on the general " merits of the claim, we are of opinion, that the de- " fender and the other heirs of entail are not entitled " to take benefit by the transaction which has been " reduced, to the manifest loss of the respondents in the " specific sums of money ascertained, and that there is " a good right in the respondents to be restored " against it.

" Without entering into any argument on the subject, " it may be proper to mention, that in forming this " opinion, we have not overlooked the eighth finding of " the interlocutor of the First Division of the Court in " the process of reduction, or the fact therein referred " to, that from the dispositions received by the respon- " dents one irregularity in the execution of the statute, " though not that on which the sale was reduced by the " House of Lords, might have been discovered. But " that circumstance does not affect our opinion as to " the equity of the present claim, so far as it appears " to us to be in other respects just and competent.

" 2. Being of opinion, that the principle of liability, " on which alone the action can be maintained, is that " of restitutio in integrum, in as far as the powers of " the court, and the circumstances of the case, will admit

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" of it, we farther think, that that principle necessarily " requires, that the appellant and the heirs of entail " shall in no case be placed in a worse situation, than " that in which they would have stood if no such trans- " action had taken place; and that, in so far as there " may be, in any of the particular objects or purposes " to which the money may have been applied, a legal " impracticability of recalling or replacing it as paid by " the respondents, the loss or inconvenience of a less " perfect remedy must be borne by the respondents.

" 3. We are therefore of opinion, that the respon- " dents are not entitled to obtain any decree against the " defender Sir William Francis Eliott, personally or " individually, for payment of the several sums of money " concluded for, by which any greater or more direct " liability to diligence for payment thereof might be " incurred, than that to which he might have been " subject, if the sales had never taken place, and the " burdens on the entailed estate, as they previously " stood, had remained unaltered. We think, that, " merely as the party at whose instance the sales were " reduced, he did not incur any such personal liability; " and that it is only in respect of the direct and defined " benefits to the estate, to which he has succeeded in " the first instance, and the other heirs of entail may " eventually succeed, that the claim of the respondents " is just and well founded against him or them. Being " of this opinion, we so far differ from the judgment " under appeal, in respect of the findings and personal " decerniture therein expressed, that we do not think " that the respondents are entitled, according to the " principles of equity on which they found, to any decree " for payment in such terms.

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" 4. The sums of money, for payment of which the " summons concludes, are of three descriptions: 1. The " sum paid for the redemption of the land-tax, being " 1,183*l.* 9*s.* 5*d.*: 2. Various sums, stated to be the " amounts of entailer's debts, or debts which were " effectual burdens on the entailed estate, as created " within the powers of the entail, and which have not " by any deeds of assignation been kept up against the " estate: And 3. A sum of 5,483*l.* 0*s.* 4½*d.* of pro- " visions stated to have been made effectual burdens on " the estate, but which have been duly kept up by " assignments. It is unnecessary to say anything of " the last sum, as it is not now in dispute. The other " two classes require particular notice.

" One of the most difficult points in the case, as it " now stands, appears to us to be that which relates to " the money applied for redemption of the land-tax. " We think that neither Sir William Eliott nor the " heirs of entail can be required to repay the capital " sum so applied; because that would be to place them " in a much worse situation than that in which they " would have been if the sales had never taken place, " contrary to the principles above laid down. For no " one of them could ever have been compelled to pay " any such sum in redemption of the land-tax; and to " require them now to pay it would not be restitutio in " integrum, but something much more to their prejudice. " And, as the land-tax, once actually redeemed, cannot " be precisely replaced with the legal remedies appli- " cable to it, this raises a serious difficulty in the means " of extricating this part of the case.

" But if the principle of equity be once settled, there " seems to be no want of power in the law of Scotland

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" to provide a mode of giving effect to it. The justice " of the case is, that there should be again laid on the " entailed estate, and the heirs of entail successively, an " annual burden equal to the amount of the land-tax as " it formerly stood, viz. 56*l.* 8*s.* 7½*d.*; and that it " should be found, by decree of this court, that this " burden shall subsist in favour of the respondents " against the defender and the other heirs of entail,— " subject, however, to one contingency. That con- " tingency is, the possible, however improbable, event, " that the land-tax in Scotland should be repealed or " diminished. Subject to that possibility, the existence " of which ought justly to exempt the heirs of entail " from all liability, because they would have got the " exemption if no sale had taken place, we are of " opinion, that the said sum of 56*l.* 8*s.* 7½*d.* may still, " by decree of this court, be declared an annual burden " on the estate, and on the defender, and every suc- " ceeding heir of entail. The court cannot give the " precise remedies which were competent for the re- " covery of the land-tax: but they can declare the " annual sums as they fall due to be recoverable by all " the ordinary diligence of the law of Scotland, without " prejudice to the provisions of the entail as to the " obligations of each heir successively in respect of the " substitute heirs. It farther appears to us, however, " that, in any such decree to be pronounced, power " ought to be reserved to any heir to redeem the burden " by payment of the sum of 1,183*l.* 9*s.* 5*d.*

" The six sums of 1,111*l.* 2*s.* 2*d.*, 111*l.* 2*s.* 2*d.*, " 1,170*l.*, 1,170*l.*, 2,500*l.*, and 1,170*l.*, concluded for " successively, and particularly described in the sum- " mons and interlocutor appealed from, consist of pay-

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" ments either of debts which were the entailer's proper " debts, or of provisions stated to have been effectually " appointed under the powers reserved by the entail; " all of which would have been burdens on the estate, " and the heirs to some effect, if no sale had been made. " It appears to us, that the deeds executed for establish- " ing the provisions were sufficient to have enabled the " children, in whose favour they were granted, to make " them effectual as burdens on the estate, according to " the power reserved by the entail. It is therefore " clear as matter of fact, that, in so far as the money of " the respondents was applied in the payment and " extinction of such debts and provisions, the estate was, " by means of that money, to that extent relieved of " burdens, which must otherwise have now affected it; " and, if the principle laid down in the first part of this " opinion be correct, we are necessarily brought to the " conclusion that the respondents, upon reduction of " the sale and eviction of the lands, are entitled to " restitution in regard to all these sums, in so far as the " court, as a court of equity, can give it, consistently " with the just rights of the appellant and the other " heirs of entail.

" In the precise remedy to be given, there may be a " difference between the two sums of 1,111*l.* 2*s.* 2*d.* and " 111*l.* 2*s.* 2*d.*, which were entailer's debts, and the " four sums of 1,170*l.*, 1,170*l.*, 2,500*l.*, and 1,170*l.*, " which consisted of bonds of provision. The former " were proper debts equally against the estate and " against every heir succeeding to it; and it will do no " injustice to find that in restoring the respondents " against the counterpart of the transaction of the sale " reduced, the same sums shall still form burdens pre-

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" cisely to the same effect, and to give decree for pay-
" ment of them against the defender, without prejudice
" to his right to keep them up as burdens on the estate,
" as the entail does indeed in express words permit.
" But with regard to the sums of provisions, as the
" entail only authorizes the heirs 'to burden and
" 'affect the lands with such provisions,' we are of
" opinion that the remedy to be afforded to the respon-
" dents can go no farther than to find and declare
" the sums paid in extinction of them to be still burdens
" on the entailed estate.

" Subject however to this distinction, we are of
" opinion that the Court has power, and that it is
" just and necessary as a matter of equity, to declare
" that these several sums shall subsist and be of
" equal effect as burdens on the estate and the heirs
" of entail, as the debts to the payment of which
" they were applied would have been if they had not
" been paid.

" With regard to the forms of diligence which may be
" competent for the sums thus to be declared to come
" in place of the bonds of provision, we are of opinion
" that those sums, when established by decree as burdens
" on the entailed estate, must be considered as standing
" in all respects in the same condition with the other
" sums amounting to 5,483*l.*, &c., which, though paid to
" the original creditors, have been kept up as burdens
" on the estate by direct assignments of the bonds; and
" that the same forms of diligence for making the bur-
" den effectual will be competent in the one case which
" would be competent in the other. As we do not think
" that the equity of the case will admit of any personal

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" responsibility being laid on the defender or any other " heir, to which they would not have been liable for the " debts as they originally stood if no sale had taken " place, we are of opinion that the nature and extent of " the diligence which will be competent must depend " on the special terms of the entail, and the legal effect " of its provisions. The clauses of the entail of Stobs " are very peculiar in their application to this point, " and it is not perfectly easy, and might be attended " with serious inconvenience, to attempt to define before- " hand what shall be taken to be the precise operation " of them. In general, but reserving our judgment if " any case of the kind shall come before us for trial, we " think that personal diligence will not be competent " for compelling the defender or any individual heir to " pay the principal sums of such provisions; that he " may be liable to such diligence for the annual interest " becoming due on them during his own possession of " the estate; that adjudication, and probably inhibition " also, against the estate, may be used for the principal " sums as debts, subject to the effect of the very peculiar " clause of the entail, providing that if any adjudica- " tions shall be led ' for debts to be contracted,' the " heir ' shall be obliged to redeem the same within the " space of eight years ' after deducing and leading such " ' diligence,' in as far as that clause may be held to be " applicable. But the precise operation of such a pro- " vision, as well as the legal effect of deeds held to be " duly executed under the power of appointing provi- " sions for younger children by this entail, may involve " questions of so much difficulty not necessary to be " resolved in the decision of this cause, that we do not

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" think that any judgment to be pronounced in it should " be made to embrace any of these points."

The Lords of the First Division having concurred in the foregoing opinion, the following judgment was pronounced:—

" The Lords, having considered the judgment of the " House of Lords, find and declare, that in the inter- " locutor appealed from they had fully in their view, " and had given due attention to the fact, that it might " have been discovered from the terms of the dispositions " accepted of by the pursuers, that one particular irre- " gularity in the execution of the statute had occurred, " though of a nature not held to be sufficient to affect " the validity of the sale; and having consulted with the " other judges, and heard counsel in presence of the " whole Court, and reviewed the opinions of the Lords " of the Second Division of the Court and of the Lords " Ordinary, recal their former interlocutor appealed " from, find that the pursuers are entitled in respect of " the sales of the lands made to them and the payment " of the prices thereof, and of the subsequent reductions " of the said sales on account of the irregularities in the " proceedings alleged against them, to be restored in " integrum against the effects of the sales being reduced, " in so far as the circumstances of the case and their " powers as a court of equity enable them to give such " restoration: find, that under any statement now before " the Court in the record, it must be assumed that the " land tax redeemed cannot be brought back, or of new " made a burden on the lands with the remedies for " execution therewith connected; but find that in equity " the heirs of entail are bound to bear a corresponding

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" burden, and that the sum of 1,183*l.* 9*s.* 5*d.*, for which " the said land tax so affecting the lands was redeemed, " must still form a burden on the estate and on the heirs " succeeding thereto, and find, decern, and declare " accordingly, and grant warrant for recording this de- " creet in the register of sasines and reversions; but " find and declare that this decree shall be subject always " to these conditions and provisions, that in case the " land tax at present exigible from all the lands of " Scotland shall be abolished or diminished, the said " burden shall also entirely or proportionally cease; " and further, that it shall always be in the power of " any heir of entail in possession of the estate to redeem " and extinguish the said burden by payment of the " foresaid sum of 1,183*l.* 9*s.* 5*d.*, but that until the same " be paid, the burden shall subsist to the effect of each " succeeding heir being bound to pay the sum of " 56*l.* 8*s.* 7*d.* annually to the pursuers, being the amount " of the sum exigible previous to the said redemption; " and that all the ordinary diligence of the law shall be " competent for the payment thereof, but that neither " the individual heirs nor the estate shall be liable to " any diligence for payment of such principal sum: " find, that in so far as the prices received from the " pursuers for the lands in question were applied in " payment of debts of the entailer, and specially of the " debts of 1,111*l.* 2*s.* 2*d.*, and 111*l.* 2*s.* 2*d.*, specified in " the record, it ought to be found and declared, and find " and declare accordingly, that these sums shall form " real burdens on the lands and estate in question; and " the Lords decern for payment thereof against all the " heirs succeeding to and possessing the said lands,

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" without prejudice always to any heir of tailzie, on his " paying such debts, keeping them up by assignation or " otherwise against the said estate, as permitted by the " entail: find, that in so far as the said prices of the " lands have been applied in payment of the provisions " for children of the family successively made by the " heirs in possession, as set forth in the record, although " the same have not been kept up by deeds of assigna- " tion, the sums thereof being 1,170*l.*, also 1,170*l.*, also " 2,500*l.*, and 1,170*l.*, these sums, together with the " sum of 5,483*l.* 0*s.* $4\frac{8}{12}$*d.*, being the amount of provi- " sions granted by the late Sir William Eliott in favour " of John Eliott his second son, Gilbert Eliott his third " son, Bethia Mary Eliott his eldest daughter, and " George Augustus Eliott his fourth son, which has " been kept up by assignation in favour of Messrs. " Douglas and Bell, must still all form real burdens on " the entailed estate to the same effect, but no farther, " as if they had not been so paid, but had still stood as " outstanding debts of the estate according to the terms " of the deeds constituting them, and decern accord- " ingly, and grant warrant for recording this decree in " the register of sasines and reversions, that all may " take notice thereof; but find, decern, and declare that " neither the defender, nor any other of the heirs of " entail, can be made liable by personal diligence for " payment of the principal sums of any of the said pro- " visions for younger children; and find that they are " and shall be personally liable successively for the pay- " ment of the interest of all such sums accruing during " their own possession of the estate respectively: find, " decern, and declare that the same forms of diligence

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" shall be competent to the pursuers for all the debts of " the entailer hereby declared to be still subsisting, not- " withstanding any discharges granted which could have " been by law competent if the said debts had been still " subsisting in the persons of the original creditors; " and find that the same form of diligence shall be com- " petent to the pursuers for any of the sums of provisions " for younger children, paid as aforesaid from the prices " of the said lands, which would have been competent " to the children in whose favour such bonds or deeds " of provisions may have been granted, if the same had " not been discharged; declaring always, as it is hereby " found and declared, that this decree shall be subject " to all the provisions and declarations of the deed of " tailzie of the lands in question, not inconsistent with " the equity declared by the findings and decernitures " in this interlocutor, and declaring all the said findings " to be without prejudice to any questions which may " arise as to the effect of any particular form of action " or diligence which may be raised in any particular " case in virtue thereof. And in respect of the pre- " ceding findings, assoilzie Claud Russell, the trustee " for the creditors of the late William Riddell, and all " others the representatives of the said William Riddell, " and of Edgar Hunter his cautioner, from the conclu- " sions of the libel, to the extent of the said several " sums of money, and decern. Quoad ultra, remit to " the Lord Ordinary to hear parties further as to the " sum of 622*l.* 8*s.* 1*d.* alleged to have been expended " by Sir Francis Eliott on improvements on the entailed " estate; likewise as to the several dates from which " interest on the said several sums shall run; also as to

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" the balance still due by the said William Riddell and " his cautioner and their representatives; and as to " what farther sums fall to be charged against the " entailed estate and heirs of entail, and generally as to " all other remaining points of the cause, and to do " therein as shall be just: find the defenders Sir William " Francis Eliott, and Sir James Boswell, George Sin- " clair, and James Brown, his trustees, who have sisted " themselves as parties to this action, and that only quà " trustees, liable to the pursuers in the whole expenses " hitherto incurred by them in this Court, and remit " the account thereof, when lodged, to the auditor to " tax the same, and to report."

Appellants Argument.

Appellants.—The judgment appealed from is at variance with the summons; it gives that which was never demanded or concluded for. The summons is at variance with itself; it concludes for repetition of sums applied in terms of the statute, and yet the groundwork of the action is, that the terms of the statute were not complied with at all. New and unprecedented burdens are attempted to be imposed upon this estate, which are utterly inconsistent with the subsistence of a valid entail, In the first place it reimposes the burden of the land tax, or rather it imposes an annual burden, not the land tax, but to be subject to some of the conditions and laws which would have applied to the land tax,—a new species of burden upon property, and a new species of right reared up against property not concluded for in the summons, and it is believed never before known in the history or practice of the law of Scotland. The burden thus imposed is even worse than the land tax, because the heirs of entail might have sold part of the entailed

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Appellants Argument.

estate to redeem the land tax, but they have no power to sell any part of the entailed estate to redeem this new burden, and nothing less than an enactment as authoritative as the statute for redemption of the land tax can give them such power. In the second place the interlocutor makes and imposes other real burdens upon the entailed estate in a manner alike unsparing and unprecedented; for instance, certain debts of the entailer had been paid off and discharged, and the present heir of entail entered into possession of the entailed estate free of these burdens. They were not kept up by assignation or otherwise. The Court of Session however has, of its own authority, and against the will of the heirs of entail, done that which the heirs of entail themselves could not have done if they had been willing, and which the respondents never thought of asking in the summons; it has imposed a new real burden upon the entailed estate in favour of the respondents to the amount of the debts which had been paid off and discharged. In like manner the interlocutor has done the same thing in regard to other sums, being the amount of the provisions in favour of younger children, which had been paid off. It is apprehended that the Court had no power to do this, and, at all events, that it was not competent for the Court to do it under the present action. The foundation of the claims of the respondents, as stated by themselves, and as dealt with by the Court, is, that the debts paid off were so paid in pursuance and professed implement of the provisions of the statute. But if so, they must have been permanently and finally paid off and extinguished out and out, and could not be revived, it being an acknowledged principle of the law of Scotland that debts once extinguished cannot by any device be revived. Indeed,

the Court has not revived them; but, finding the entailed estate clear, it has of its own accord done that which is not only at variance with the former precedents, but which nothing short of an act of parliament could effect, viz., created and put upon it a new real burden in favour of the respondents, with all the qualities of the debts that were paid off. The heirs of entail are made personally liable for sums of money which are the personal debts of a preceding heir of entail whom the appellant (the heir of entail) does not represent, which are not legal burdens upon the estate entailed, and for which neither the present heir of entail, nor those who may succeed, incurred any liability either personally or by representation. The judgment appealed from purports to do what has not hitherto been attempted to be done by the Court of Session, either as a court of law or of equity, is contrary to the principles and practice of the law of Scotland, and wholly unsupported by any authority or precedent. To give the respondents a right to recover the sums concluded for, either from the appellant or any of the heirs of entail, or out of the entailed estate, is directly inconsistent with the right of the heirs of entail, sustained and given effect to in the former action to reduce the sales as a fraud upon the entail, and contrary to the act of parliament, and practically denies benefit to the heirs of entail from the judgment they have already obtained reducing such sales.

While the Court of Session has recalled and altered its former judgment, while it has not given to the respondents that which they asked under their summons, but has devised a remedy for them in something which they did not conclude for, it has found them entitled to the whole expenses of the litigation,

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Appellants Argument.

contrary, as the appellants humbly conceive, to the principles which ought to regulate the awarding of costs. Nay, it has even found the respondents entitled to recover from the present appellants the separate expenses which the respondents have incurred in this cause in the discussion between them and Riddell's representatives, in which discussion too the respondents have not been successful.

Respondents Argument.

Respondents. — Nothing can be more clear and distinct than the tenor and object of the summons. It is distinctly averred in the summons that Mr. Riddell was named and approved of as statutory trustee in terms of the act of parliament, under the application for sale at the instance of Sir William Eliott. It is then averred that Mr. Riddell, as statutory trustee, received, directly from the respondents, or out of the monies paid by them, the sum of 15,420*l*, which, with the exception of a small balance, he avers that he duly applied, in the execution of his duty, in terms of the statute, and under warrant of Court, to the redemption, in the first place, of the land tax, and next to the payment of debts which affected the entailed estate, as being either entailer's debts, or debts contracted under faculties reserved in the entail. The action proceeds upon this ground, that either the statutory trustee on the one hand, or the heirs of entail and entailed estate on the other, are responsible to the pursuers for this sum of 15,420*l*., the latter being responsible in so far as it has been applied by the statutory trustee for the benefit of the entailed estate, in the manner prescribed by the act, that is to say, in redemption of the land tax, or in payment of debts and burdens affecting the estate, and the former

in so far as it has not been applied by him as statutory trustee, or, in other words, in so far as it remains in his hands, or has been applied otherwise than under warrant of court, and to the purposes prescribed by the statute, namely, the redemption of the land tax and the payment of debts and burdens on the estate. When the respondents speak of sums applied in terms of the statute, they use the words designative, and as elsewhere used in the summons, to mean the sums appropriated by the trustee in payment of entailer's debts, redemption of land tax, and other burdens for which the estate was liable. The respondents do not seek to constitute against the entailed estate, or against Sir William Eliott, as heir in possession, or against the heirs substitute, any new or extraordinary or enlarged responsibility, or any liability of any kind, or to any effect higher than attached to the entailed estate, and the heirs of entail under the various burdens and debts, in payment of which the price received by the statutory trustee has been applied. The heirs substitute of entail were not called as defenders, in order to obtain any direct or personal decree against them, but only in respect of their interest as heirs substitute in the entailed estate, and to the effect merely of constituting and declaring such responsibility against the entailed estate, and against the heirs succeeding to and holding it, as the estate and those heirs were previously under, in respect of the burdens and provisions which may have been paid by the statutory trustee. In like manner, as against Sir William Francis Eliott, the heir in possession, the conclusions proceeding on the supposition which forms the basis of the present argument, that he does not generally represent his father, are directed against him only as heir in possession, and to the extent

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Respondent's Argument.

to which he was liable for the debts and burdens in question. For some of them he was clearly liable personally, out and out, as, for example, for the bonds of provision in favour of his brothers and sisters, granted by his father, under the power of providing for younger children, conferred by the entail; and for which provisions he had given his own personal bond of corroboration, which stands at this moment assigned to trustees. Quoad ultra, the respondents did not demand decree against Sir William Eliott, beyond that liability which, as heir of entail in possession, he had already contracted for the debts and burdens affecting the estate and heirs in possession, and to which the trustee applied the price. For such burdens as entailer's debts, or debts contracted in execution of powers reserved or created by the entail, and as to which there exists no entail, or at least no entail which can exclude the creditor, the estate itself is very clearly liable. Some discussion there may be about the extent of the personal liability of the heir in possession, so far at least as regards the principal, but in no view can there be any discussion about interest, which it is the peculiar duty of the heir in possession to keep down during the term of his possession.[1] Generally, with respect to the principal also, the respondents apprehend it to be plain that an heir of entail, by taking possession of the entailed estate, though he may not be liable ultra vires of his succession, does incur direct and immediate responsibility to the extent of his succession, and so far as he is lucratus by it, for all debts, which, being contracted by an entailer or by former heirs of

[1] Campbell v. Campbell, 29th Nov. 1815, Fac. Coll.; Erskine and others v. Lord Mar, 7th Jul 1829, 7 S. & D., 844.

entail under powers and faculties created and reserved by the entail, form a necessary burden on the succession. The mere circumstance of the party interested not having taken an assignation, as he confessedly might have done, is not of itself sufficient to extinguish the debt, or justify the plea that it does not subsist, and cannot be made effectual to any intent or purpose whatsoever.[1]

There can be no doubt that the late Sir William Eliott could have taken assignations, and kept up all these debts. The respondents are in all respects in right of Sir William Eliott, and, through him, in right of the price, and consequently of all those debts or securities affecting the entailed estate, which have been paid by that price. Under the circumstances, the fact that no assignation was taken cannot deprive the respondents of the security which, through an assignation, they might unquestionably have obtained. The case of Sloane Lawrie v. Donald is a clear authority for the respondents on this point. That case is noticed by Mr. Shaw, under dates 1st June 1825 and 7th December 1830, but is only partially reported by him. It is understood, however, that the facts of the case, so far as necessary to be now considered, are very shortly these:—Mr. Walter Lawrie entailed two estates, Redcastle and Bargattan, by two separate entails, which, with respect to the concluding part of the destinations, were not identical, so that the estates came ultimately to descend to different parties. Sloane Lawrie was the heir in possession of both estates in 1799, and in that year, under the authority of the existing statutes for redemption of the land

[1] Temple and Halliday v. Gairns, 22d Feb. 1706, Mor. 15355; Gordon v. Sutherland, 29th January 1731, Mor. 11534; Scott of Harden, 20th Dec. 1751, Mor. 15394; Kerr v. Turnbull, 15th Feb. 1758, Mor. 15551.

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tax, he sold Edgarton, a farm of Redcastle, but for the purpose of redeeming the land tax payable not out of that estate only, but also out of Bargattan. Sloane Lawrie became himself the purchaser, through a trustee. The price was applied in redemption of the land tax of both estates, and in payment of debts due by Walter Lawrie, the common entailer, and with respect to several of those debts there was not an assignation taken, but simply a discharge and renunciation. Sloane Lawrie possessed for some time after this sale, and was succeeded by Kennedy Lawrie, upon whose death the two entails divided, Bargattan going to Kennedy Lawrie's disponees, he having been the last substitute in that entail, and Redcastle, part of which had been sold, going to another party, the substitute in that entail. In the meantime Kennedy Lawrie, who immediately succeeded Sloane, had brought an action of reduction of the sale, which was afterwards insisted in by the heir succeeding to Redcastle, and decree was obtained, first in the Court of Session and afterwards in this House, reducing the sale. An accounting then commenced between the parties in right of Bargattan, which had now become a fee simple estate, and the heirs succeeding to Redcastle. The Court found, or at least proceeded on the assumption, that although the entailer's debts had been paid out of the price, and some of them not upon assignation, but upon discharge and renunciation, they were yet not extinguished, and accordingly they gave Mr. Sloane Lawrie's representatives, who had come also to possess the estate of Redcastle, relief of those entailer's debts against the heir of Bargattan, according to the relative value of that estate, the heir of Redcastle being liable for the remainder; and in like manner they found

the heir of Bargattan liable in the money which had been expended in redeeming the land tax of that estate.

To show the injustice which would result from an opposite rule, suppose that the purchaser at the sale had himself been a previous creditor, and that in part payment of the price he had granted precisely such a deed of discharge in extinction of his debt over the general estate, as those upon which the appellant here founds, could it ever have been maintained that an heir of entail could set aside the sale, thereby depriving the purchaser of his lands, and at the same time withhold from the purchaser, in his quality of previous creditor, the right to have his original debt revived, and this forsooth upon the notable argument that because the heir who made the sale had taken a discharge and not an assignation, the debt was extinguished confusione? The price of the lands sold, or what is purchased with the price, whether land tax or previous debts or other lands or money securities, is to be regarded as constituting in some sort a surrogatum for the lands. The heir of entail who challenges the sale cannot have both the lands and their surrogatum. The party who is entitled to the surrogatum, the lands, being re-vindicated, is not the party who gets back the lands, but the party with whom the lands were at the date of revindication, and from whom by force of that revindication they have since been taken. As between him and the heirs of entail revindicating the entailed estate, there can be no sort of question. The rule of law is universal: "Nemo debet ex aliena jactura lucrari." [1]

[1] Stair, b. 1. t. 8. s. 607. See to same effect, Erak., b. 3. t. 1. s. 10. & 11; Bankton, b. 1. t. 9. s. 4.; Pothier, tom. iv. p. 474–5 (Du Droit de Proprieté, 343–345).

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Upon the dependence of the present action, the respondents raised an inhibition against the appellants, dated 6th June and executed 7th June and 3d July, and registered 15th July 1828. When the judgment of the Court of Session, of 18th January 1833, was pronounced, the appellants presented an application for recall, on the ground, inter alia, that the judgment had sufficiently secured the right of the respondents to any debt which was due to them, and that the appellant had since succeeded to the estate of Wells, rented at 3,000*l.* per annum, which would also be affected by the inhibition; upon which the Court pronounced the following interlocutor:—"The Lords, having heard counsel "for the parties, refuse the desire of the petitioner; "find expenses due to the respondents, and remit."

Judgment of Court, 4th July 1833.

This interlocutor was also made the subject of a separate appeal.

THE LORD CHANCELLOR, after stating the import of the judgment of the House of Lords remitting the cause to the Court of Session, and the judgment of that Court thereupon, observed that the equity was clear in favour of the respondents, and nothing had been urged against the judgment appealed from which in any degree impeached its accuracy. His Lordship therefore moved an affirmance.

The House of Lords ordered and adjudged, That the said original appeal be and the same is hereby dismissed this House; and that the said interlocutor of the 31st of January (signed 2d June) 1837, by which the said interlocutor of the 18th of January (signed 7th February) 1833 was, upon

the said remit from this House, recalled, be and the same is hereby affirmed: And it is further ordered and adjudged, that the said cross appeal be and the same is hereby dismissed this House.

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JOHN BROWNLEY— SPOTTISWOODE and ROBERTSON— G. & T. WEBSTER, Solicitors.

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ADVOCATION. See *Practice*, No. 9.

AGENT AND CLIENT.

1. Where a deed of agreement of compromise of their respective claims to the succession of a deceased relation had been settled and executed by three parties, one of whom afterwards brought an action of reduction of the agreement on the ground of lesion, through erroneous advice of her law agent, (who was agent also of the two other parties,) as to her legal rights, of which she was ignorant:—Held (affirming the decision of the Court of Session) that, upon the facts and written evidence of the transaction, the party had failed to establish relevant grounds for disturbing the agreement. Stewart v. Stewart, 3d June 1839, - page 401
2. A country agent was employed by a manufacturing company to prepare petitions, at their instance, to the justices of peace against two apprentices, for having deserted their work, and other misconduct. The agent accordingly prepared and presented petitions, founded on the 4th Geo. 4. c. 34., but libelling the third section, instead of the first which related to apprentices in the situation of those complained of; the apprentices were convicted and imprisoned, but subsequently liberated by the Court of Justiciary in respect of the wrong section having been founded on, and they thereafter sued the company for damages and expenses: Held (affirming the judgment of the Court of Session) that as the terms of the act were clear, the agent was liable in relief, although there was no established course of practice under the statute, and although neither the opposite agents in the inferior court nor the Sheriff-substitute of the county considered the petitions to have been erroneously libelled. Hart and Hodge v. Frame and Co., 18th June 1839, - - 595

AMENDMENT OF LIBEL. See *Practice*, No. 9.

APPEAL.

1. The partners of a distillery were convicted in penalties, which were levied from the appellant and respondent respectively: the appellant sued the respondent for his share of certain cash advances made by him for behoof of the company; the respondent brought an action against the partners for indemnity from the said penalties on the ground of nonparticipation in the

APPEAL—*continued.*

offence: the appellant, among other defences to such action, pleaded, that, the partners having been all in the same delict, there was no ground for contribution or indemnity by one against the other. The judgment of the Lord Ordinary or of the Court was not taken on that defence; and the Lord Ordinary sent the cause for trial by a jury. The judge at the trial gave no direction as to said defence, and no exception was tendered: and a verdict was returned for the respondent. The Court, upon motion with notice by appellant for a rule to shew cause why the verdict should not be set aside and a new trial granted, refused to grant a rule to shew cause why the verdict should not be set aside; thereafter the Court applied the verdict and decerned for the sum found due, with costs, which were also subsequently decerned for: Held, that an appeal against such judgment, applying the verdict and decerning, was competent. Campbell v. Campbell, 3d June 1839, - page 387

2. Held, that an interlocutor, passing a bill for letters of suspension pronounced by the Inner House upon report of the Lord Ordinary on the bills, is not an interim order, and may be competently appealed against, even although the suspender has expede the letters of suspension before intimation of such appeal. Fleming v. Dunlop, 13th June 1839, - - - 547

APPEAL. See *Practice*, Nos. 3. and 5.

ARRESTMENT.

A party held an intimated assignation, as a security for certain specified debts and relief of specific obligations; another party, creditor of the granter of the assignation, used arrestments in the hands of the assignee, and of the debtor in the assigned debt. Held (affirming the judgment of the Court of Session) that the assignee, in accounting with the arrester, was entitled to take credit, in the first place, for the amount of the debts and obligations specified in the assignation, and all expenses relating thereto; secondly, for all sums paid to or for behoof of and for all furnishings made by him to the common debtor prior to the arrestment; and, thirdly, for all sums which, though paid for behoof of the common debtor after the date of the arrestment, were paid in virtue of obligations contracted prior thereto: Held further, (affirming as aforesaid) that it was competent for the assignee to prove by the oath of the common debtor that his claims fell under one or other of the above descriptions. Clyne's Trustees v. Dunnet and others, 25th February 1839, - - 28

ASSIGNATION. See *Arrestment.*

ASSIGNATION IN SECURITY. See *Extent.*

BANKRUPT. See *Consignation.*

BILL OF EXCEPTIONS.

In an action of nuisance one of the defender's witnesses, when cross-examined by the pursuer, answered, "Knows Glasgowfield (a

BILL OF EXCEPTIONS—*continued.*

" neighbouring property); never knew of any damage done " there." The counsel for the pursuer then proposed to ask the witness, " Whether he had known of any sum having been paid " by the defenders to the proprietors of Glasgowfield, for alleged " damage?" The judge, at trial, refused to allow the question to be put, whereupon the pursuer excepted. There was a verdict for the defenders:—Held (reversing the judgment of the Court of Session, which allowed the exception,) that the proposed inquiry, being irrelevant to the subject matter, was inadmissible as evidence. Tennant and Co. v. Hamilton, 5th August 1839, page 821

BONA FIDES.

Circumstances in which held (affirming the judgment of the Court of Session) that an arrangement had been entered into by the general creditors of an insolvent debtor, including a party holding a prior heritable security and parties holding postponed heritable securities, which would make it a breach of good faith in the parties to adopt separate proceedings, and the postponed heritable creditors having, subsequent to said arrangement, poinded the ground:—Held, further, in a question with the prior heritable creditor, that such proceedings could not have effect, and that it was immaterial whether a preference at law had been thereby gained, since it could not equitably be used. Beveridge and another v. Smith, 5th August 1839, - - 806

BONA FIDE PAYMENT. See *Consignation.*

BONA FIDE POSSESSION.

During the dependence of proceedings in court to determine a disputed right of salmon fishing, one of the parties was allowed for several years to possess the fishings in dispute, subject to an express order of Court to keep and preserve an account of the number of salmon caught by such party or his fishermen, which was accordingly kept till the question of right was determined; and the adverse party having established his right to said salmon fishings:—In an action by the party who had so established his right, to recover from his opponents the free proceeds of said salmon during the period of possession thus illegally retained,—Held (affirming the interlocutor of the Court of Session) that the plea of bonâ fide possession set up for the defenders was not well founded. Magistrates of Dingwall v. Munro and another, 29th July 1839, - - - - - 772

BURGH.

An application for suspension and interdict having been made by a party alleging that he had been duly elected provost of a burgh, and founding upon the minutes of election as his title to the possession of the office, and stating that he was molested by a party also claiming to have been elected provost, and who alone was called as a respondent, or was sought to be interdicted; and the bill of suspension having been passed by the Inner House on report of the Lord Ordinary on the bills,—Held (reversing the

BURGH—*continued.*

interlocutor of the Inner House deciding in the bill chamber) that, as the validity of the election of the provost could not, under the statute 3 & 4 W. 4. c. 76., be tried by summary application, in which the two claimants were alone made parties, the suspension and interdict were incompetent. Fleming v. Dunlop, 13th June 1839, - - - - page 547

Question raised, but not determined, as to the party who (under certain circumstances) was entitled to preside at the election of a provost, and, in case of an equality of votes, to exercise the right of giving a casting vote. S. C. - - 547

BURGH. See *Trust*, No. 2.

CASTING VOTE. See *Burgh.*

CARRIER.

In an action by consignors for value of a puncheon of whiskey thrown overboard, and lost, against ship owners, who by bill of lading acknowledged the shipment of the goods in good order and condition, " to be delivered in the like good order at New- " castle," dangers and accidents of the sea excepted, and which bill of lading the consignors transmitted to the consignee, with an invoice of the price, including the amount of freight and of the insurance paid by consignors, and charged against the consignee,—the consignors libelled a contract by the ship owners to deliver the goods at Newcastle, and also an agreement by the consignors to be answerable to the consignee for the safe delivery of the goods. The judge at the trial directed the jury in point of law, " That as it appeared that the pursuers at the time of " furnishing the spirits in question had sent an invoice thereof " to the purchaser, bearing that the same had been insured, and " that the freight thereof and insurance were charged against the " said purchaser in the invoice, the pursuers were not entitled " in law or interest to recover the value of the said puncheon " from the defenders:"—Held (reversing interlocutor of the Court of Session, which disallowed an exception to said direction,) that said direction was in point of law not correct in the mode in which it left the case with the jury,—in respect that it withdrew from their consideration the fact whether the goods had been delivered to the carriers on the risk of the consignors or of the consignee, and the question whether there was a special contract between the consignors and consignee sufficient to enable the consignors to recover in the action. Dunlop and Co. v. Lambert, 16th July 1839, - - - 663

CHARITY.

Held, on consulting the judges, and affirming an order in Chancery, that the import of the 71st sect. of 5 & 6 W. 4. c. 76. is, that the estate, title, and interest of bodies corporate, &c. of boroughs, in charitable estates, held by them in trust, should absolutely cease and determine on 1st August 1836, notwithstanding its being thereby provided that said estate, title, and interest should

CHARITY—*continued.*
continue "until the 1st day of August 1836, or until parliament "shall otherwise order." Bignold and another v. Springfield and others, 5th August 1839, - - - page 837

CHURCH. See *Patronage.*

COMPETITION.
A party lending a large sum over an estate possessed in fee simple, stipulated to receive as part security, in addition to a bond and disposition in security in his favour, assignations to certain incumbrances of a prior date. The incumbrances were paid by the trustee and agent of the borrower, but it did not appear with whose money. In a question between a party holding an incumbrance intervening between the assigned incumbrances and the bond and disposition in security,—Held, that the presumption was, that the prior incumbrances were paid with the money of the assignee, and as there was no evidence to the contrary, that (affirming judgment of Court of Session) the assignment conferred a preference over the intermediate incumbrance. M'Kenzie and others v. Orr and others, 26th March 1839, - - 117
See *Bona fides.*

CONSIGNATION.
A company having been pressed by a creditor, who threatened legal proceedings, but whose title to discharge the admitted debt the company doubted, remitted the amount to their agents, who, with full authority for that purpose, after depositing the sum in bank, lodged the bank receipt in a process of multiplepoinding then commenced, in order to be disposed of as the court should appoint; and an order of court having thereafter been pronounced, appointing the said agents to consign the admitted sum in bank, upon a receipt taken, payable to such person as should be preferred by the court, and to lodge the receipt with the clerk to the process; the company was sequestrated before this order of court had been complied with:—Held, in a question betwixt the creditor and the trustee on the debtor's estate, (affirming the judgment of the Court of Session,) 1. that the amount had been effectually consigned, and formed no part of the sequestrated estate of the debtor; 2. that as a bonâ fide consignation, and equivalent to payment of an admitted debt, which the debtor in the ordinary course of business and under pressure agreed to consign, such consignation was not struck at by the act 1696, c. 5. Brock and others v. M'Callum and others, 24th June 1839, - - - - - 617

CONSUETUDE.
Held, that usage, or acquiescence in a particular construction of a statute, founded upon alleged circumstances and practice, to which the individual defenders were not parties, could not relevantly be admitted as evidence of such construction to be binding on those defenders. Ewing and others v. Burns and others, 6th June 1839, - - - - - 435

CONTRACT. See *Partnership—Carrier—Trust*, No. 2.

COSTS.

1. Costs, including those incurred by respondent in unsuccessfully opposing, on the ground of incompetency, an appeal, which was afterwards dismissed on the merits, awarded against the appellant. Gray v. Forbes and others, 13th June 1839, - page 530
2. Per L. C.—Incompetent to appeal for costs, and it is indispensibly necessary to maintain the rule, that parties appealing should not be permitted to mix up their appeal with matter of merits in order to cover appeal for costs. Clyne's Trustees v. Dunnet and others, 25th February 1839, - - 28

See *Jury Trial*, No. 1.—*Practice*, Nos. 2. and 3.

CUSTOM.

On quo warranto for exercising the office of alderman of London the defendant pleaded two customs of the city of London; viz. a custom for the court of mayor and aldermen to examine and determine whether a person elected alderman of a ward, and returned to the said court as such alderman, be, according to their sound discretion and consciences, a fit and proper person and duly qualified; and also a custom that where the same person shall be three times elected to be alderman by a ward, and three times rejected by the court of mayor and aldermen as not a fit and proper person and not duly qualified to support the dignity and discharge the duties of the office, the mayor and aldermen may for remedy thereof nominate, elect, and appoint a fit person, being a freeman, out of the whole body of citizens, to be alderman of such ward; and further pleaded that a party who was three times returned by a ward had been adjudged unfit by the mayor and aldermen who elected the defendant; the relator took issue upon the existence of the customs, and replied that the party rejected was fit and qualified, upon which issue was joined. The Lord Chief Justice, at the trial, directed the jury, that if they were of opinion that the customs aforesaid had existed from time immemorial down to 1689, of which there was evidence, they should find for the customs, notwithstanding a city bye-law of the 13 Anne, and the statute 11 Geo. 1. c. 17., which, as alleged by defendant, had put an end to the customs. The jury then found the customs, and the Lord Chief Justice, without consent of parties, discharged the jury from returning a verdict on the issues as to fitness, &c, as being immaterial. Upon verdict for the defendant, and bill of exceptions by relator: Held, (affirming the judgment on error from the Exchequer Chamber, which affirmed the direction of the Lord Chief Justice,) 1. That the stat. 11 Geo 1. c. 18. and the city bye law of the 13th of Queen Anne relating to the mode of election, stood well with the customs as proved, and did not touch the power of rejection and selection in the mayor and aldermen. The King v. Johnson, 19th February 1839, - - - - - 1

DEATHBED.

A party, "in the event of his predecease," made a conveyance to his parents and the survivor, whom failing, to any persons whom he might name, whom failing, any person they might name. His parents predeceased him, leaving a trust conveyance of their whole property in favour of trustees named. He thereafter executed a deed on deathbed, conveying his whole estate to trustees named, declaring the purposes, and revoking all former statements so far as they interfered therewith: Held, (affirming the judgment of the Court of Session,) that the first deed, neither singly nor taken in connexion with the second deed, was effectual to disinherit the heir; and that the deathbed deed could not be coupled with the first, or with the first and second deeds, so as to exclude a challenge of it by the heir. Clyne's Trustees v. Clyne, 18th March 1839, - - - - page 72

ENROLMENT OF DECREE.

Circumstances in which, without disposing of a ground of appeal that a decree, alleged to have been duly enrolled, was incompetently opened, and a rehearing allowed; it was held, that parties were not bound by their declining at such rehearing to take another case for opinion of a court of law; and the cause remitted to court below to allow the exercise of such option. Sheehy and others v. Lord Muskerry, 11th June 1839, - - 493

ENTAIL.

1. A party, by deed of entail, disponed his lands "to and in favour "of M. in liferent only, during her lifetime after me, and to the "second son to be lawfully procreated of her (M.'s) body, and "the heirs to be lawfully procreated of his body, whom failing," to other parties "heritably and irredeemably." The deed provided that "the second son of the said M., and the other heirs substitutes," should bear the entailer's name and arms; the cardinal prohibitions, and relative irritant and resolutive clauses, were directed against "the said M., or any of the heirs aforesaid;" J., the second son of M., was not born till some time after the entailer's death. Upon his attaining majority, he expede a general service as nearest and lawful heir of entail and provision to the entailer, and a title was completed in favour of M. in liferent only, and himself in fee. In a question betwixt J. and a substitute heir,—Held (affirming the judgment of the Court of Session), 1. that the fetters had not been effectually imposed on J. the institute:—2. that if a party be by the terms of a deed of entail the first beneficial taker of the fee he is the institute, although by the conception of the destination the fee would appear to be in pendente between the death of the entailer and his birth, without supposing a fiduciary fee in a party having a previous liferent:—3. that a party who is institute by the terms of an entail does not, by expeding a service as heir of tailzie and provision to the entailer, and making up his title under the entail, debar himself from pursuing a declarator of his immu-

ENTAIL—*continued.*

nity as institute from the fetters of the entail. Logan v. Logan and others, 1st August 1839 - - page 790

2. (*Prohibitory Clause.*)—The prohibitory clause in a deed of entail provided "that it shall at no rate be allowable to the "said (institute) nor any of the substitutes above named, to sell "off or dispose upon, any part of the lands and subjects before "transmitted, nor to contract debt, or do any other deed "whereby the said lands and subjects may be adjudged or "evicted from the succeeding members of entail, or their hopes "of succession thereto in any measure evaded."—Held (reversing the judgment of the Court of Session) that there was no sufficient prohibition against altering the order of succession. Lang v. Lang, 16th August 1839, - - 871

3. (*Irritant Clause.*)—A deed of entail contained prohibitions to sell, contract debt, &c.; the irritant clause voided "all such "debts and deeds."—Held (reversing the judgment of the Court of Session) that there was no effectual irritancy against sale. S. C. - - - - - 871

4. Question, Whether a party who takes under an entail as heir male of the body of the institute is affected by prohibitions directed against "the substitutes above named." S. C. 871

5. (*Prohibitory Clause.*)—The following words, in the prohibitory clause of a deed of entail, were inserted immediately subsequent to prohibitions against selling and contracting debt, &c., viz. "or to do any other fact or deed in prejudice of the said taillie, "and of the persons above named, and their foresaids." Held (affirming the judgment of the Court of Session,) that they were sufficient to prevent an alteration of the succession. Monypenny v. Campbell, 16th August 1839, - - 898

6. Question, Whether it is necessary to fence with irritant and resolutive clauses a prohibitory clause against altering the order of succession? S. C. - - - - 898

7. An heir of entail having sold certain portions of an entailed estate, under a warrant from the Court of Session, applied the purchase money, 1st, in redemption of the land tax; 2d, in payment of entailer's debts; and, 3d, in payment of provisions to younger children. The sales were set aside as irregular at the instance of a succeeding heir. In an action of declarator, repetition, and damages, by the purchasers,—Held (affirming the judgment of the Court of Session), 1st, that the estate should be liable to an annual payment corresponding to the land tax, redeemable on payment of a sum specified as the value thereof; 2d, that in so far as the prices of said lands were applied in payment of debts of the entailer, the same should form real burdens upon the estate; and 3d, that such should also be the case with the sums applied in payment of provisions, although the same might not have been kept up by assignation: Further, that the heirs of entail should not be liable to personal diligence for payment of the principal sums of any of said provisions, but that

ENTAIL—*continued.*

they should be personally liable successively for payment of the interest of such sums during their possession of the estate respectively. Further, that the same forms of diligence should be competent for the debts of the entailer as if the same had been still subsisting in the persons of the original creditors; and also, that the same form of diligence should be competent for any of the sums of provisions for younger children which would have been competent if the same had not been discharged; "declaring "always, that this decree shall be subject to all the provisions "and declarations of the deed of tailzie of the lands in question, "&c.; and declaring all the said findings to be without preju- "dice to any questions which may arise as to the effect of any "particular form of action or diligence which may be raised in "any particular case in virtue thereof." Eliott and others v. Cleghorn and others, 27th August 1839, - page 1033

See *Outlawry.—Warrandice.*

EVIDENCE.

Per L. C.—It is an acknowledged rule of evidence that a collateral irrelevant inquiry cannot be gone into to discredit a witness on the other side. Tennant and Co. v. Hamilton, 5th August 1839, - - - - - - 821

See *Jury Trial* (*New Trial*), No. 1.—*Bill of Exceptions—Salmon Fishing.*

EXECUTION PENDING APPEAL. See *Practice*, No. 8.

EXTENT.

Two partners of a trading firm executed a trust conveyance of part of their shares in the partnership stock to certain co-obligants in bonds of credit at a bank, under the conditions; first, that before any sale or transfer of the said stock should take place, the trustees should be bound to give three months intimation of their intention to the assignors; and, secondly, that the trustees should be bound to apply the proceeds of the stock in paying whatever should be due on the bonds of credit at the time of the sale of the stock. The assignors intimated said assignation, by having the stock transferred in the books of their firm to the names of the assignees. A writ of extent was afterwards issued against the assignees as Crown debtors, at which time the value of the stock so assigned was 960*l.* 4*s.* 8*d.*, and the debt due on the bonds of credit was 1,200*l.* Upon scire facias by the Crown against the trust assignees,—Held, (reversing on error the judgment of the Court of Exchequer in Scotland,) that the assignees had by virtue of the intimated assignation a special property in said stock, available against the Crown seizing the stock under an extent against the assignors for a debt due to the Crown. Spears and others v. Lord Advocate, 11th June 1839, - 585

FRAUD. See *Trust*, No. 1.

INHIBITION.

Circumstances in which (affirming judgment of Court of Session) inhibitions and arrestments used against trust estates were simpliciter recalled. Stuart and others v. Carnegie and others, 29th April 1839, - - - page 192

INSTITUTE. See *Entail*, Nos. 1. and 2.

INTEREST, COMPUTATION OF.

The arrears due on certain prior incumbrances (see *Competition*) were from omission not assigned till a subsequent period, when they were separately conveyed to the same party: — Held (affirming the judgment of the Court of Session) that the lender was not bound to compute payments of interest previous to the assignment of the arrears on the sum lent by him towards extinction of these arrears in diminution of his security. M'Kenzie and others v. Orr and others, 26th March 1839, - 117

ISSUE. See *Jury Trial*, No. 3.

JOINT STOCK COMPANY. See *Partnership*.

JURY.

Where the jury have found their verdict on all the material issues found, the judge who tries the cause may without the consent of the parties discharge the jury from returning any verdict on issues that are in his opinion immaterial. The King v. Johnson, 19th February 1839, - - - - 1

JURY TRIAL.

1. (*New Trial.*)—A party in a cause in equity to establish the trusts of a will under which he claimed estates of great value, stated and adduced evidence that he was the eldest legitimate son of a marriage of his parents in January 1801, and an issue having thereafter been sent to trial at law, the evidence at which trial adduced by the same party went to show that the marriage had taken place in January 1802, and the party having got a verdict, and the Court of Equity having, upon motion by the adverse parties, ordered a new trial, before a jury of the same county upon payment of the costs of the former trial, and allowed the former verdict to be used in evidence at the new trial, Held, 1. (affirming in part said order) that a new trial ought to be granted, in respect that the issue sent had not been satisfactorily tried, the case made at the trial being different from that made in equity; 2. (further affirming in part said order) that manifestations of applause by one or more of the jury at the close of the speech to evidence of the counsel for the successful party at the trial, was no sufficient reason for altering the venue, or for directing the new trial to be had in one of the counties where the estates in question were situated; 3. (reversing in part said order) that the verdict obtained on the former trial ought not to be given in evidence on the new trial of the issue; 4, (further reversing in part said order) that costs of the former

JURY TRIAL—*continued.*

trial ought not to be allowed to the party who got the verdict, but that said costs ought to be reserved. O'Connor and others v. Malone, 6th June 1839, - - page 468

2. Observed per L. C. In reference to the circumstances of the case, that where a suit involved only a subject of account arising out of a right as established in a previous suit, there appeared to be no ground whatever for sending the cause in the first instance to a jury. Magistrates of Dingwall v. Munro and another, 29th July 1839, - - - - 772

3. In an action, in which the main question in dispute was whether a party had intromitted with his father's effects, the Lord Ordinary found, first, "That further investigation is necessary," and second, "that no sufficient cause is assigned for de- "parting from the general rule for ascertaining disputed "questions of fact," and therefore remitted the cause to the jury roll. On reclaiming, the court refused the desire of the note as incompetent, quoad ultra of consent, recalled the interlocutor of the Lord Ordinary hoc statu, in so far as it contains findings in the causes, and remitted to proceed as shall be just. An application was then made to re-transmit the cause to the ordinary roll of the Court of Session, which was refused; on reclaiming the interlocutor refusing was recalled, and the Court remitted to the Lord Ordinary to re-transmit the cause to his Lordship's Court of Session roll, and to order a proof by commission. The House of Lords reversed the judgment, but on the ground that the Lord Ordinary was right in directing a trial by law, as the question was one which it was fit and proper so to try. Montgomerie v. Boswell, 23d April 1839, - - 136

4. Question, Whether an interlocutor of a Lord Ordinary directing trial by jury in an unenumerated cause can competently be submitted to review. S. C. - - - 136

5. (*Issue.*)—Under an issue, Whether a particular act has been done "to the loss, injury, and damage" of a party, it is left open to try the question of the damage, and the liability of the party causing the damage to make compensation. Per L. C., confirming the opinion of Lord Eldon, Chancellor. Duncan v. Findlater, 23d August 1839, - - - - 911

JURY TRIAL. See *Practice.*

KIRK. See *Patronage.*

LEASING POWER.

Question respecting, remitted for rehearing. Sheehy and others v. Lord Muskerry, 11th June 1839, - - 493

LEGACY.

Circumstantial case, where (upon construction of a testament) it was held, 1, (affirming the judgment of the Court of Session, which affirmed a finding by the Lord Ordinary,) "that the "shares of the residue, so far as the same consisted of capital

LEGACY—*continued.*

" sums set apart for answering the said annuities, provided to " the said A. P. and M P (two legatees) by the fifth purpose " of the trust, whereby the residue was appointed to be paid to " the seven individuals therein named, share and share alike, " and the 'survivors or survivor' of them, under the conditions " farther therein expressed, were not so vested in the said A. P. " and M P. as to enable them effectually to dispose thereof;" and, 2, (varying the judgment of the Court of Session, and remitting with a declaration,) that the legacies to two other legatees by the sixth purpose of the deed declared were payable to them at the first term of Whitsunday or Martinmas after the testator's death. Pearson and another v. Casamaijor and others, 18th July 1839, - - - - - - page 685

LIFERENT AND FEE. See *Entail*, No. 1.

LONDON, CITY OF. See *Custom*.

MARRIAGE.

1. Circumstances held sufficient to constitute a marriage (affirming the judgment of the Court of Session). Per L. C. It is not necessary to prove the contract itself; it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place. Upon this principle the acknowledgment of the parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a marriage. Hoggan v. Craigie, 23d August 1839, - 942
2. (*Promise cum copula.*)—Question as to the application of the rule of law in reference to promise subsequente copula, in cases in which cohabitation has also preceded the promise. S. C. - - - - - - - 942

   Question as to the effect of a release of a promise of marriage intervening between the promise and a subsequent copula. S. C. - - - - - - - 942

NUISANCE.

An application being made for suspension and interdict against the erection of slaughterhouses, the party complained against, after interim interdict, alleged that he had discovered a mode of conducting the proceedings in these houses which would prevent their being a nuisance. The Lord Ordinary (Corehouse) passed the bill, but in respect the party complained against " desired to go on with the erection of the buildings at his " own risk, and agreed that his doing so shall not be considered " as affording him any plea of favour when the question of " nuisance shall be determined," recalled the interdict in so far as it prohibited the erection of the buildings, but quoad ultra continued the interdict. Upon discussing the expede letters, the Lord Ordinary (Fullerton) found that the erection of shambles or slaughterhouses in the situation proposed would be a public nuisance, and therefore sustained the reasons of suspension, and

NUISANCE—*continued.*

continued the interdict, and found the respondent liable in expenses. The Court, upon a reclaiming note, after ordering a condescendence of the precautionary measures the respondent (appellant) meant to adopt, and having examined plans and models of the buildings, adhered to the interlocutor of Lord Fullerton. The House of Lords (the party complaining having intimated that he had no desire to foreclose the party complained against from having his case reconsidered upon a change of circumstances,) declared, that the appellant ought to be interdicted in the terms of the interlocutor of the Lord Corehouse; and that liberty be reserved to the appellant to apply for an opportunity to try the experiment, whether he can conduct the business of slaughtering cattle upon his premises, mentioned in the appeal, without creating a nuisance. Pedie v. Swinton and others, 26th August 1839, - - - page 10

OUTLAWRY.

A party executed a disposition of his heritable property ex facie absolute, but which the disponees afterwards declared by a separate deed was held in trust for the grantor, his heirs and disponees. He was afterwards cited to appear before the Court of Justiciary for murder alleged to have been committed previous to the date of said disposition; and, on his not appearing, sentence of fugitation passed, and denunciation followed thereon, which was recorded. Some years afterwards, when still unrelaxed, he executed a deed, directing his said trustees to execute a strict entail of his property in favour of certain parties, which was accordingly done, and after his death recorded by the trustees. In a challenge of the entail by the heir at law:—Held (affirming the judgment of the Court of Session) that the entail, and subsequent registration thereof, were valid and effectual, in respect that a sentence of outlawry does not deprive a party of the right of absolute disposal of the fee of his property. Macrae v. Macrae, 27th June 1839, - - - 645

PARISH. See *Poor.*

PARTNERSHIP.

In an action by directors of a joint stock company against the other solvent partners for relief of advances and obligations by the directors personally in the management of the affairs of the copartnery, Held, upon construing the contract of copartnership (affirming the interlocutors of the Court of Session) that certain special defences founded on the terms of the contract ought to be repelled. Alexander and others v. Macalister and others (Caledonian Dairy Company), 7th May 1839, - - 353

PATRONAGE.

A presbytery having rejected without taking on trial the licensed presentee of the undoubted patron of the parish: Held (affirming the decision of the Court of Session) that an objection to the jurisdiction of the Court ought to be repelled; that the presentee

PATRONAGE—*continued.*

was validly and effectually presented to the church and parish; that the presbytery did and do refuse to take trial of his qualifications, and had rejected him as presentee, on the sole ground that a majority of the male heads of families, communicants in the said parish, had dissented, without any reason assigned, from his admission as minister; that the presbytery in so doing acted to the hurt and prejudice of the pursuers, illegally and in violation of their duty, and contrary to the provisions of the statutes libelled, particularly 10 Anne, c. 12. Presbytery of Auchterarder v. Earl of Kinnoul and Young, 3d May 1839, - page 220

PAUPER. See *Practice*, Nos. 2. and 3.

POOR.

Where lands had been disjoined and separated by act of parliament from a parish in which the same had been previously assessed for poor rates, and annexed to and made part of the extended royalty of a burgh; In an action by the kirk session of the original parish against the owners and occupiers of houses on the disjoined lands for payment of the proportion of poor rates leviable on said lands as if still liable to the original parish, and against the magistrates and council of the burgh, as liable in relief to the other private defenders:—Held upon construction of the act of parliament (reversing the judgment of the Court of Session), 1, That the owners and occupiers of houses on the lands so disjoined were not subject to their former liability for poor rates to the original parish, and also that the magistrates and council were not liable directly to the original parish, or in relief to the other defenders, for such poor rates; 2, (also reversing as aforesaid), That an action directed not only against the alleged primary obligants, but also against other parties as liable in relief to them, and a decree following thereon by which the parties as liable in relief were ordained to make payment of sums decerned for against the primary obligants, in the event of such primary obligants failing to pay, were incompetent. Ewing and others v. Burns and others, 6th June 1839, - - 435

PLEADING.

In an action directed against the clerk and treasurer of road trustees, acting under the statutes, for injury sustained by alleged negligence on the part of persons employed by them, the summons concluded against the said trustees and their said clerk for payment of a sum as compensation, it was pleaded for the trustees that the "injury, such as it was, not having arisen from mis- "conduct on the part of the trustees, or of any person for whom "they are in law responsible, or from any cause for which they "are legally responsible, the defender is entitled to absolvitor." When the record was closed, an issue was sent to a jury to try whether the act complained of had been done to the loss, injury, and damage of the pursuer. The House of Lords reversed the interlocutor directing the issue, the Lord Chancellor observing,

PLEADING—*continued.*

that, " as the ground of defence appears upon the summons itself, " and in the defences as originally made, the cause was, before " the interlocutor directing the issue, in a state which would " have enabled the Court to dispose of it." Duncan v. Findlater, 23d August 1839, - - - - page 911

POLICE. See *Title to pursue.*

PRACTICE.

1. Per Lord Wynford.—In deciding on bills of exceptions, it is the practice of the Court not to go into the whole record, but to decide upon the points raised by the bill of exceptions. The King v. Johnson, 19th February 1839, - - - 1
2. (*Pauper.*)—No objection to a warrant for interim execution that a printed copy of the petition has not been laid before each of the judges, nor is it an objection to such warrant for payment of costs, that the party obtaining the warrant has sued in formâ pauperis, and that his own agent alone signed the bond of caution. Clyne's Trustees v. Clyne, 18th March 1839, - - - 72
3. (*Pauper.*)—A respondent suing in formâ pauperis allowed to be heard on presenting his printed cases as the bar; but costs refused him on that account, although there were otherwise sufficient grounds for awarding them in his favour. Clyne's Trustees v. Clyne, 18th March 1839, - - - - - 72
4. Additional printed cases having been lodged by permission of the Court, without objection, containing a ground of action not originally founded on. Per L. C.: A Court of Appeal will not readily listen to an objection of this kind, not made in the Court below, if it appears from the whole case presented to said Court, that no injustice has been done. Halkett v. Nisbet's Trustees, 28th February 1839, - - - - 53
5. Question, whether when appealing against a judgment of the Court, it is competent to include in the appeal interlocutors of the Lord Ordinary in the cause, not previously made the subject of a reclaiming note. Clyne's Trustees v. Dunnet and others, 25th February 1839, - - - - 28
6. Held that the Court may, before exhausting the whole pleas of the parties, lay down certain principles, by declaratory findings, which shall regulate the future proceedings in a cause, and be the foundation of ulterior findings, the consideration of which may be reserved. Alexander and others v. Macalister and others, 7th May 1839, - - - - 353
7. In a reduction the defender pleaded certain pleas which he designated preliminary. A record was ordered to be made up on these pleas, upon which the defender reclaimed, when the Court (on the ground that the defences pleaded as preliminary were the only defences pleadable in causâ upon which it might be necessary to make up a record) adhered. The record was then prepared, and the defender repeated his former pleas, but without again designating them as preliminary. The Lord Ordinary " repelled the dilatory defences," reserving a question

PRACTICE – *continued.*

arising out of these pleas to be discussed with the defences on the merits, and found expenses due. On reclaiming, the Court adhered. Held, that an appeal against the judgment was competent without leave of the Court. Clyne's Trustees v. Clyne, 18th March 1839, - - - page 72

8. (*Execution pending appeal.*)—Incompetent to appeal against a warrant of the Court of Session for interim execution, and payment of costs so as to stay execution of such order as has been thereon made. Clyne's Trustees v. Clyne, 18th March 1839, 72

9. An insurance company raised an action against one of their former partners and directors to have him ordained to concur in signing a discharge of an heritable debt which stood in his name; an extended deed of discharge was produced along with the summons, and the conclusion of the libel was to ordain the defender "to grant, execute, and deliver to the pursuers the "foresaid discharge and renunciation, to be produced at calling "hereof;" the defender stated objections to signing the deed in the shape it then stood; the pursuers craved leave to amend the summons by inserting the words "or such valid and suffi- "cient discharge and renunciation of the said debt as the "debtor therein is bound to receive;" the defender opposed the amendment, and the sheriff found the proposal incompetent, "because changing and extending the nature and conclusions "of the libel." The record was closed, and the sheriff found that the defender was not bound to execute the deed libelled on and produced, but suggested alterations which he, the sheriff thought necessary; and a new deed, accordingly altered, having been lodged in process, the sheriff "decerned the defender to "subscribe the amended deed of discharge," which the defender refused to do, and advocated; the pursuer did not advocate on the ground of refusal to allow the amendment, neither did he propose to open up the record, and state an additional plea in law on that point: Held (reversing the judgment of the Court, but affirming the interlocutor of the Lord Ordinary) that the defender was not bound to sign the only deed which he was called upon by the summons to subscribe—Observations by Lord Chancellor (1.) as to rule of practice in a court of equity in such a case, and (2.) as to appeal on one branch bringing up whole cause to superior court. Stewart v. Gloag and others, 25th July 1839, - - - - - - 721

PRACTICE. See *Appeal — Pleading — Jury Trial — Enrolment of Decree.*

PRELIMINARY DEFENCES. See *Pleading.*

PROCESS. See *Practice—Burgh.*

PROOF. See *Evidence—Arrestment.*

PUBLIC OFFICE. See *Road Trustees.*

REFERENCE TO OATH. See *Arrestment.*

REPARATION. See *Road Trustees—Agent and Client.*

RESTITUTION. See *Entail*, No. 7.

RIGHT IN SECURITY. See *Arrestment.*

RISK. See *Carrier.*

ROAD TRUSTEES.

Held (reversing the judgment of the Court of Session) that road trustees on a public road are not liable for any injury which may happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors or other persons employed by the trustees or by the officers of the trustees when engaged in any operation performed under the authority of the trustees. Duncan v. Findlater, 23d August 1839, - page 911

SALMON FISHING.

At the trial of an issue as to whether certain stake nets and other engines were placed in situations prohibited by the statutes regulating the salmon fisheries, the judge, in the course of his direction to the jury, after defining estuaries as spaces between the strictly proper river and the strictly proper sea, the waters of which were partly salt and partly fresh, proceeded thus:—"The "mere name is of little importance. The thing to be looked "to is the fact of the absence or of the prevalence of the fresh "water, though strongly impregnated by salt. Now, where "this fresh water prevails, though in the estuary, these structures "are illegal." The Court of Session disallowed a bill of exceptions to the direction. The House of Lords reversed this judgment, and remitted the cause with directions to allow the bill of exceptions, and grant a new trial. Horne v. Mackenzie and another, 26th August 1839, - - - - 977

Question raised,—Whether it was matter for exception that a witness had been allowed during his examination to use, for the purpose of reference, a printed copy of a report, with certain jottings and calculations recently made thereon, relative to the subject of his testimony, which report he had prepared on the employment of the party adducing him as a witness:—observed, per L. C.—It is clear that for some purpose at least the witness was at liberty to refer to the paper he produced, and that a bill of exceptions could not have been supported on that ground. S. C. - - - - - - 977

See *Bonâ fide Possession.*

SERVICE. See *Entail*, No. 1.—*Warrandice.*

STAKE NETS. See *Salmon Fishing.*

STATUTES 1424, c. 11., and others, anent Salmon Fishings in Scotland.

———— 1696, c. 5. See *Bankrupt.*

———— 10 Anne, c. 12. See *Patronage.*

———— 11 Geo. 1. c. 18. sec. 7. See *Custom.*

———— Glasgow Police Stat., 1821. See *Title to pursue.*

STATUTES 39 & 40 Geo. 3. c. 88. See *Poor.*
——— 42 Geo. 3. c. 116. See *Entail*, No. 7.
——— 48 Geo. 3. c. 151. See *Burgh.*
——— 55 Geo. 3. c. 42. See *Appeal.*
——— 59 Geo. 3. c. 35. sec. 16. See *Appeal.*
——— 4 Geo. 4. c. 34. See *Agent and Client*, No. 2.
——— 3 & 4 Will. 4. c. 76. See *Burgh.*
——— 5 & 6 Will. 4. c. 76. sec. 71. See *Charity.*
SUSPENSION AND INTERDICT. See *Appeal*, No. 2.
TEINDS. See *Warrandice.*
TESTAMENT. See *Legacy.*
TITLE TO PURSUE.
1. Held (affirming the judgment of the Court of Session) that residenters in Glasgow, rateable in police taxes, had not as such at common law, nor under the Glasgow police act, title enabling them to sue the police commissioners for misapplication of the funds. Ewing v Inglis and others, (Glasgow Commissioners of Police,) 16th August 1839, - - - - page 847
2. (1.) Held, as in preceding case of Ewing v. Inglis, (affirming the judgment of the Court of Session) that rate-payers, as such, had no title to pursue commissioners of police, on behalf of themselves and others, for misapplication of funds. (2.) Parties (being also commissioners of police) having sued as rate-payers in a complaint against the general body of commissioners, in which character the Lord Ordinary decerned against them, and having in that character reclaimed to the Court, and the Court (adhering to the interlocutor) having found that they could not so sue:— Held (affirming as aforesaid) that it was not competent to ask the judgment of the Court, on the ground that as a minority of the commissioners of police complaining of the acts of the majority, they had a sufficient title notwithstanding. Morrison v. Glasgow Police Commissioners, 16th August 1839, - 868

TRANSACTION. See *Agent and Client*, No. 1.
TRUST.
1. A party executed a settlement in favour of certain trustees, who accepted and chose an agent to act for them: the agent, in conjunction with one of the trustees, the husband of a party beneficially interested, who was also heir at law of the truster, procured said party interested to make up a title to part of the trust estate passing over the trust, and thereupon to execute a disposition in his favour, on the ground that it was in security of advances for the trust. The agent thereupon took infeftment, and executed a conveyance in favour of third parties: Held (affirming the decision of the Court of Session) that the agent was bound in the first instance, without awaiting the result of an accounting, to restore the estate in integrum against the real security created by the disposition and infeftment. Fraser v. Carnegie and others, 25th April 1839, - - - - 171

TRUST—*continued.*

2. Where funds were vested in the magistrates and council of a burgh as trustees, to apply the yearly produce in the support and maintenance from time to time of "schools" taught on the Madras system, and the town council entered into an agreement with the several kirk sessions in the burgh, binding themselves and their successors to pay over the dividends equally among the kirk sessions, each of the latter becoming bound to lodge annually with the council a vidimus, "showing definitely "that the dividend was to be strictly applied in the promotion "of the system of education proposed by the donor, and "accompanied by an obligation by the kirk session to apply "the same accordingly," and so long as each kirk session "did so and satisfied the town council" that the contract was duly performed, it should have right to its share of the dividend, and not otherwise, provision being made for admitting members of the town council to the annual examination of the schools, "to satisfy themselves of the bonâ fide and legitimate appli-"cation of the dividend," and the contract bearing that this was done strictly in terms of the deed of donation, the town council of a subsequent year having refused to implement the contract: Held, (affirming the judgment of the Court of Session,) that the contract was strictly within the competency of the magistrates and town council as trustees, and that the performance of such contract was binding on all parties. Gray v. Forbes and others, 13th June 1839, - - - - - page 530

TRUST. See *Outlawry.*

VENUE. See *Jury Trial* (*New Trial*), No. 1.

VERDICT. See *Jury Trial*, No. 1.

VESTING. See *Legacy.*

WARRANDICE.

A. being infeft in an entailed estate, and becoming afterwards entitled to another entailed estate, devolved the first to his brother under burden of debts, for which it was afterwards brought to sale by his brother's apparent heir. Neither entail contained the statutory fetters against alienation and contracting debt. Upon A.'s death, B., his son, was served lawful and nearest heir of line, taillie, and provision to him, in special, in the estate last above mentioned, and was infeft therein accordingly: Held. (affirming the judgment of the Court of Session,) that B. was liable in an obligation of warrandice against future augmentations, granted by an ancestor of A. in the first-mentioned estate. Halkett v. Nisbett's Trustees, 28th February 1839, - - 53

WILL.

See Pearson and another v. Casamaijor and others, p. 685, in the argument, in which reference was made to Wordsworth v. Wood, since decided by Lord Chancellor, 4th Dec. 1839. There, the question was, Whether, in a gift to the testator's daughters, words

WILL—*continued.*

importing survivorship referred to surviving the testator or surviving his widow, who was the tenant for life under the will. The Lord Chancellor held that upon the true construction of the words, those daughters only were entitled who survived the widow. The question was raised on behalf of the children of a daughter who survived the testator, but died in the lifetime of the widow, leaving children. By the decision of the court, which allowed a demurrer to the bill filed by those infant children, it was held that by the death of their mother, in the lifetime of the widow, they had not acquired a vested interest.

ERRATA.

Page 212, line 5 from foot, *for* " on " *read* " or "

Page 245, line 4 from foot, *for* " new a " *read* " a new "

Page 273, line 14, *for* " deniable " *read* " undeniable "

Page 277, line 7, *dele* " and " *and read* " nobody can contend "

Page 285, line 14, *dele* " it " *and insert* " a party "

Page 324, line 9, *for* " 1698 " *read* " 1690 "

Page 422, line 8, *for* " provision " *read* " division "

Page 427, line 18, *dele* " as "

Page 519, line 23, *for* " in " *read* " on "

Page 572, last line, *for* " were " *read* " was "

Page 577, line 27, and page 578, line 3, *for* " of " *read* " and "

Page 578, line 8, *for* " in " *read* " is "

Page 660, line 13, *for* " refuse " *read* " require "

Page 664, line 6 from foot, and page 666, line 12, *for* " Houston " *read* " Houghton "

Page 774, line 12, *for* " party " *read* " parties "